Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

EUGENE EVANS,

Petitioner,

v.

CITY OF BERKELEY,

Respondent.

On Petition for Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The City of Berkeley has disqualified the Berkeley Sea Scouts from the city's program allowing free berthing at the Berkeley Marina for community-oriented nonprofit organizations necessitating that Petitioner Evans personally pay the berth fees. The Sea Scouts have been excluded because of their affiliation with the Boy Scouts of America, and because the City contends that the Boy Scouts' belief-based membership policies conflict with city anti-discrimination rules.

1. Does refusing access to a generally available government program, facility, or benefit, on the basis of an applicant's philosophically based viewpoints or associations (and actual adherence to those viewpoints and associations), violate the First Amendment freedom of belief and association?

2. Does refusing access to a generally available government program, facility, or benefit, on the basis of an applicant's philosophically based viewpoint or associations (and actual adherence to those viewpoints and associations), violate equal protection of the laws under the Fourteenth Amendment and the principle that government must be viewpoint neutral in allocating benefits and making public facilities available?

PARTIES TO THE PROCEEDING

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PETITION FOR WRIT OF CERTIORARI

Eugene Evans, respectfully petitions this Court for a writ of certiorari to review the judgment of the California Supreme Court.

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 38 Cal. 4th 1, 40 Cal. Rptr. 3d 205, 129 P.3d 394 (2006), and is included in Appendix (App.) A. The opinion of the California Court of Appeal is reported at 127 Cal. Rptr. 2d 696 (2002), and is included in App. B. The opinion of the Superior Court of Alameda County, California, is not reported and is included in App. C.

JURISDICTION

The judgment of the California Supreme Court was entered on March 9, 2006. No petition for rehearing was sought. The time to file this petition was extended to July 7, 2006, by Justice Kennedy's order of June 5, 2006, Appendix E. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND REGULATORY PROVISIONS AT ISSUE

The First Amendment to the United States Constitution provides in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."

The Fourteenth Amendment, Section 1, of the United States Constitution provides in pertinent part, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

City of Berkeley Resolution 58,859-N.S. provides in pertinent part, "The Berkeley Marina advocates and practices equal opportunity in terms of access to its berthing facilities. Availability and use of the facilities will not be predicated on a person's race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability or medical condition."

STATEMENT OF THE CASE

The facts stated are those found by the California Supreme Court decision at issue (App. A) as augmented by the First Amended Complaint (App. D). Under California law, on demurrer, all material facts properly pleaded are admitted. App. A-1. As set forth in *Boy Scouts of America v. Dale*, 530 U.S. 640, 648-49 (2000), "Because this is a First Amendment case where the ultimate conclusions of law are virtually inseparable from findings of fact, we are obligated to independently review the factual record to ensure that the state court's judgment does not unlawfully intrude on free expression." The complaint is provided for that purpose.

Petitioner Eugene Evans has been a participant in the Berkeley Sea Scout program (Sea Scouts) since joining at age 13 in 1957. Petitioner is the most senior of the active Sea Scouts, and is the Skipper of Sea Scout Ship #44, the *Farallon*, and at the time this action was filed had been a Sea Scout Skipper for over 27 years. Petitioner, a practicing California credentialed teacher, now personally pays over $500 per month in berth fees on behalf of the Sea Scouts. As a result, Petitioner can no longer afford to pay the membership fees of impoverished youths, resulting in loss of membership in the Sea Scouts, and the Sea Scouts have had to scale back community outreach and formerly free services and events such as cruises, meals, and overnight camping trips which Petitioner formerly paid for. Petitioner was duly authorized, together with the other plaintiffs below, to bring this action in a representative capacity

on behalf of the other Sea Scout program participants, past and future. App. D-6-D-7.

The Sea Scouts are a nonprofit association with no formal administrative structure affiliated with the Boy Scouts of America (BSA). The Sea Scouts run an unfunded program with no budget and no paid employees. The adult members, including Petitioner, use Sea Scout vessels to teach sailing, seamanship, marine engine repair, electrical repair, woodworking, and other skills for a maritime career, as well as teamwork, to teenagers who pay no more than $7 a year to participate. Ethnic diversity is a hallmark of the Sea Scouts, and many youth participants are economically disadvantaged. App. A-2.

The Sea Scouts operate under BSA's regional office, the Mount Diablo Council. Each Sea Scout "ship" functions as the equivalent of a Boy Scout troop. BSA provides the group with a low-cost maritime liability insurance policy, but gives it no direct funding. BSA follows a constitutionally protected policy of excluding avowed homosexuals and atheists. *Dale*, 530 U.S. 640. In the late 1930's, the City of Berkeley, California, began giving BSA one or more free berths at its marina for use by the Sea Scouts after the Mount Diablo Council permitted Berkeley to quarry rock from BSA property to build the marina and breakwater. The arrangement was formalized by city resolutions in 1945 and 1969 that required compliance with marina rules and regulations and allowed revocation on 30 days' written notice. App. A-2-A3.

In March, 1997, the Berkeley City Council adopted through Resolution 58,859-N.S. a uniform policy for awarding free berths to nonprofit community service organizations. The resolution provided that an organization seeking free berth space must "supply a beneficial public service," the benefit of which "greatly exceeds the value of the berth." The organization also must demonstrate, through membership policy

and practices, that it promotes cultural and ethnic diversity. The resolution further specified that access to marina facilities may not be predicated on a person's race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability, or medical condition. The resolution directed the Berkeley Waterfront Commission to review applications and make recommendations to the City Council. When the Sea Scouts' participation came up for review in early 1998, the Waterfront Commission expressed concern that BSA's policy relating to homosexuals and atheists conflicted with Resolution 58,859-N.S. and asked the Sea Scouts to provide a "local policy statement" ensuring nondiscrimination. The Sea Scouts, in negotiation with the Mount Diablo Council, approved a policy statement intended to satisfy Berkeley's requirements. App. A-3-A-4.

In its April 8, 1998, letter to the Waterfront Commission manager, the Sea Scouts stated:

> We will continue to comply with the Constitution of the United States of America, the laws of the State of California and the Berkeley Municipal Code—including Section 13.28.060 and City Council Resolution No. 58,85[9], N.S. [¶] . . . We actively recruit adult leaders and adolescents meeting the minimum age requirements without regard to sex, race, color, national origin, political affiliation, religious preference, marital status, physical handicap or medical condition. We believe that sexual orientation is a private matter, and we do not ask either adults or youths to divulge this information at any time.

App. A-4-A5.

The Waterfront Commission recommended that the City Council continue the Sea Scouts' free berths. App. A-5.

Nonetheless, on May 5, 1998, the Berkeley City Council voted to disqualify the Sea Scouts from participating in the program of free access for community service organizations. According to the council minutes, the free berths were discontinued "due to [BSA's] discriminatory policies against gays and atheists." In a letter notifying the Sea Scouts of this action, the Berkeley Waterfront Manager stated the City Council had denied free berths to the Sea Scouts because the Sea Scouts "were associated with the national Boy Scouts of America organization which has a national policy of discriminating based on sexual orientation and atheism." App. A-6-A-7.

Petitioner and other Sea Scout participants filed suit in Alameda County, California, Superior Court, citing in their complaint violation of their First Amendment rights of speech and association and Fourteenth Amendment equal protection rights under the United States Constitution, among other causes of action. App. D-29. The superior court sustained a demurrer to Petitioner's First Amended Complaint without leave to amend and entered a judgment dismissing the entire action with prejudice. App. C-3-C-4. Those same federal rights were raised on appeal to the California Court of Appeal which affirmed the judgment dismissing Petitioners' federal and other claims. App. B-16. Further review of those federal rights was sought in a petition to the California Supreme Court which also dismissed Petitioner's federal claims. App. A-26. The decision of the court below, review of which is sought, directly concerns the federal issues raised in this petition—the First and Fourteenth Amendments to the United States Constitution. App. A-8.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AS TO THE CONSTITUTIONALITY OF WITHHOLDING GENERALLY AVAILABLE PUBLIC BENEFITS FROM POLITICALLY DISFAVORED ORGANIZATIONS

A. The Decision Below Conflicts with This Court's Decisions on Freedom of Speech and Association

The court below held that under this Court's precedents, the fact that Berkeley's nondiscrimination requirement applied only to programs assisted by a city subsidy in the form of free berths is "virtually dispositive." App. A-9. The court ignored the requirement that where a state antidiscrimination law impacts the freedom of association, the proper standard of review is traditional First Amendment analysis. *Boy Scouts of America v. Dale*, 530 U.S. at 658-59. Content-based restrictions on speech are constitutional only if they withstand strict scrutiny. *See Sable Communications v. FCC*, 492 U.S. 115, 126 (1989). The California court failed to apply that standard.

Berkeley terminated the Sea Scouts' free berth participation because they "were associated with the national Boy Scouts of America which has a national policy of discriminating based on sexual orientation and atheism." App. A-6-A-7. The California court found that "Berkeley, in conditioning free berths on a group's adoption of a nondiscriminatory membership policy, has not prohibited or penalized plaintiffs' exercise of speech or associational rights." App. A-12. The court disregarded this Court's ruling that the First Amendment "right to freedom of association is a necessary

correlate to the constitutionally protected freedom of speech." *Roberts v. United States Jaycees*, 468 U.S. 609, 622-23 (1984) (*Jaycees*). Infringement "on this freedom can take a number of forms" including penalties or withholding benefits from individuals *because of their affiliation with a disfavored group*. Government "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent." *Healy v. James*, 408 U.S. 169, 187-88 (1972).

In *Healy*, students sought to form a local college chapter of Students for a Democratic Society (SDS) and receive official recognition of their organization by the college, entitling the organization to use campus facilities to hold meetings. However, SDS had been "a catalytic force" (408 U.S. at 171) in unlawful disruptions of college campuses across the nation. The college president therefore denied recognition to the chapter. The students sued, alleging abridgment of expressive and associational rights. This Court, ruling for the students, noted that it "consistently [had] disapproved governmental action . . . denying rights and privileges *solely because of a citizen's association with an unpopular organization.*" *Id.* at 185-86 (emphasis added). Instead, to justify sanctions, government must "establish" (1) a "knowing affiliation with an organization *possessing unlawful aims and goals,* and [(2)] *a specific intent to further those illegal aims.*" *Id.* at 186 (emphasis added). But the aims and goals objected to by Berkeley are not unlawful.

Dale, 530 U.S. at 660, declares BSA membership policies to be not just lawful, but constitutionally protected. Federal and state statutes mandate the same result. Thus, 20 U.S.C. § 1681(a)(6)(B) specifies that the ban on discrimination based on sex in any education program or activity receiving federal financial aid is not applicable to the membership policies of the Boy Scouts. 20 U.S.C. § 7905(b)(1) requires that "*[n]otwithstanding any other provision of law*," public schools receiving federal aid may not deny equal access to or

discriminate against "any group officially affiliated with the Boy Scouts . . . based on the membership or leadership criteria or oath of allegiance to God and country of the Boy Scouts of America." (Emphasis added.) 42 U.S.C. § 5309(e) declares that no state or unit of local government that has a designated open forum, limited public forum, or nonpublic forum and that receives assistance under this chapter of the Housing and Community Development Act shall deny equal access or discriminate against any youth organization, specifically including the Boy Scouts of America and its affiliated groups, that wishes to participate in that forum. To similar effect, California law provides that no state or local agency may charge a "youth group," specifically defined to include the Boy Scouts, more than other similar groups for access to a public beach or recreation area. Cal. Gov't Code § 53077.5(b) and (a)(5). Cal. Rev. & Tax Code § 214(a) exempts BSA from taxation and the Boy Scouts are specifically exempted from certain sales and use taxes. Cal. Rev. & Tax Code § 6361(b)(3).

The court below's holding that the right of association is not abridged by punitive action that stops short of outright prohibition on free association, App. A-12, has been rejected by this Court. "[T]he Constitution's protection [of free association] is not limited to direct interference with fundamental rights." *Healy*, 408 U.S. at 183. Thus in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), "[t]he requirement . . . that the NAACP disclose its membership lists was found to be an impermissible, *though indirect*, infringement of the members' associational rights." *Healy*, 408 U.S. at 183 (emphasis added). Similarly, in *Healy*, the fact that a student group wrongly proscribed from campus could still freely associate outside of campus did not "ameliorate significantly the disabilities" of being kept off campus. *Id.*

The First Amendment right of freedom of association includes the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and

cultural ends." *Jaycees*, 468 U.S. at 622. Petitioners' recreational and skill building activities, App. A-2, under the supervision of adult leaders, advance Sea Scout expressive goals just as surely as BSA instills organizational "values by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing" where values-laden lessons are taught during the encounters. *Dale*, 530 U.S. at 649.

In *Rumsfeld v. Forum for Academic & Institutional Rights*, ___ U.S. ___, 126 S. Ct. 1297, 1312 (2006), this Court cited *Healy*, 408 U.S. at 180-84, for the principle that the First Amendment prohibits government from imposing penalties or withholding benefits based on membership in a disfavored group. Thus, in *Elrod v. Burns*, 427 U.S. 347 (1976), when individuals were terminated from at-will government jobs solely because of their affiliation with a disfavored political party this Court found that such dismissals "severely restrict" associational rights protected by the First Amendment. *Id.* at 372. *See also Branti v. Finkel*, 445 U.S. 507 (1980) and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). In none of these cases did this Court inquire into whether the retaliation victim shared every specific belief of the expressive organization with which he was affiliated; affiliation was protected—and retaliation rejected—without regard to the extent to which the member shared the beliefs of the larger organization.

Jaycees noted that unconstitutional government actions against freedom of association "can take a number of forms . . . . [including imposing] penalties or withhold[ing] benefits from individuals because of their membership in a disfavored group." 468 U.S. at 622. This is precisely what Berkeley has done, and the court below approved, App. A-6-A-8, by withholding a benefit generally available to nonprofit organizations solely because of the Sea Scouts' association with BSA, a disfavored group.

In sum, by punitively excluding the Sea Scouts from the program of free-berthing for nonprofits, Berkeley curtailed their constitutionally recognized expressive associational activities much as the college in *Healy* infringed associational rights by denying a group of students official recognition and benefits because of their affiliation.

B. The Decision Below Conflicts with This Court's Decisions on Viewpoint Discrimination

The court below upheld Berkeley's exclusion of the Sea Scouts, including Petitioner, from a generally available program on viewpoint related grounds. App. A-8. This exclusion violates the viewpoint neutrality mandate laid down by this Court. Once it has created, by its own discretion, a program or subsidy available to members of the public, government cannot then pick and choose recipients on the basis of their viewpoint. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995).

Even in a nonpublic forum, government may not discriminate based on a speaker's viewpoint. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985). In *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), this Court struck down the exclusion of a community group from public school facilities because it wanted to present a film addressing family issues from a particular viewpoint—in fact, a religious perspective. This Court declined to address what kind of forum the school facilities represented, but instead found that even if the school facilities amounted to a nonpublic forum, the exclusion of the expressive group was unconstitutional because the exclusion was viewpoint motivated. *Id.* at 393-94. Thus even if the free berthing program from which Berkeley has excluded the Sea Scouts is not a public forum, limited or otherwise, the exclusion violates the First Amendment because it targets and punishes

the constitutionally protected viewpoints that Berkeley attributes to the Sea Scouts.

1. The Prohibition of Viewpoint Discrimination Applies to the Granting of Subsidies

The court below held as "virtually dispositive" the fact that Berkeley's nondiscrimination policy applied only to what the court characterized as a city subsidy. App. A-9. In fact, what is at issue is the Sea Scouts' exclusion from a generally available program allowing nonprofits the free use of the marina facilities. This is no more of a "subsidy" than the free use of school facilities in *Lamb's Chapel*. In any event, *Rosenberger* makes clear that the prohibition of viewpoint discrimination applies even in the granting of monetary subsidies. There, this Court invalidated as impermissible viewpoint discrimination a public university's policy of denying subsidies to journals expressing religious viewpoints while providing subsidies to journals with other viewpoints. 515 U.S. at 837. This is comparable to the Sea Scouts' situation: they have been denied free-berthing that Berkeley is making available to other nonprofits on the basis of what Berkeley alleges to be the Sea Scouts' viewpoint, or at least the viewpoint of BSA with which the Sea Scouts are associated. *Rosenberger* condemned such viewpoint-based discrimination holding that "the government offends the First Amendment when it imposes financial burdens . . . based on the content of [one's] expression." 515 U.S. at 828. A financial burden is precisely what Berkeley has imposed on Petitioner by excluding the Sea Scouts from the free-berthing program—alone among nonprofits that have applied for that program—because of the politically incorrect content of certain expressive policies that Berkeley has attributed to Petitioners.

The court below relied on the statement in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540,

541 (1983), that the government's "decision not to subsidize the exercise of a fundamental right does not infringe that right and thus is not subject to strict scrutiny." App. A-10. However, this Court has made clear that the viewpoint neutrality requirement applies to the government's distribution of all sorts of valuable benefits, including subsidies. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) ("[E]ven in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'" (quoting *Regan*, 461 U.S. at 550)).

The lower court, App. A-11, relied heavily on *Grove City Coll. v. Bell*, 465 U.S. 555 (1984), as "the closest case on point." There, a federal statute required recipients of federal education funds to agree not to discriminate on the basis of sex. When the college refused to sign the standard "Assurance of Compliance" form, the government terminated its tuition assistance to the college's students. *Id.* at 560-61. The California court, however, neglected to note that *Grove City* was grounded on Congress' Spending Clause power. *Id.* at 575 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Berkeley does not enjoy any similar constitutional spending power which resides exclusively in Congress. U.S. Const. art. I, § 8, cl. 1.

Moreover, after discussing *Grove City*, *Rumsfeld* cited "other decisions" that "recognize a limit on Congress' ability to place conditions on the receipt of funds," 126 S. Ct. at 1306, including *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003). That case held "that 'the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" *Rumsfeld*, 126 S. Ct. at 1307. Under this unconstitutional conditions principle, a law would be unconstitutional if government could not directly require the recipient of funds to do the acts necessary to receive the funds. *Id.* This Court held: "Because the First Amendment would not

prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds." *Id.*

This Court's decision in *Dale*, 530 U.S. 640, makes clear that Berkeley could not directly require BSA or the Sea Scouts to admit atheists and homosexuals. In holding that Berkeley may attempt to accomplish that same end by withholding funds available to every other nonprofit organization, the decision below is in direct conflict with *Rumsfeld*.

2. Viewpoint Discrimination Is Permissible Only When Government Institutes a Program or Subsidy as an Instrument of Expressing Its Own Message or to Perform Its Governmental Functions

This Court has permitted viewpoint discrimination in the awarding of subsidies only in the very specific situation where the government has established a program or a funding arrangement by which the government "*itself* speak[s] or subsidize[s] transmittal of a message." *American Library Ass'n*, 539 U.S. at 213 n.7 (quoting *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001)) (emphasis added). The free-berthing program does not present a message of any kind. It merely provides for recreational activities in the Berkeley Marina. Thus the limited context in which subsidies may be distributed with viewpoint discrimination is not applicable here.

C. The Decision Below Conflicts with This Court's Decisions on Compelled Speech

At the March 11 and April 8, 1998, meetings of the Waterfront Commission, Berkeley public officials set out as a condition for the Sea Scouts to continue to receive free berthing, that Petitioners must disseminate, advocate, and proselytize Berkeley's viewpoint on sexual orientation

discrimination to the BSA in efforts to change the BSA's national policies regarding gays and atheists. App. D-18-D-20.

Rumsfeld notes that this Court's "leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." 126 S. Ct. at 1308. Government's desire to compel dissemination of its ideological message cannot outweigh a private individual's First Amendment right to avoid becoming the carrier for such message. *Wooley v. Maynard*, 430 U.S. 705, 715-16 (1977). If government were freely able to compel citizens to propound political messages with which they disagree, protection of a citizen's freedom of speech would be empty. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 575-76 (1995).

Berkeley may believe that the BSA's membership policies are immoral, but this Court has stated that government may not legislate solely to impose its own ideology upon individuals or groups. "The issue is whether the majority may use the power of the State to enforce [its] views on the whole society through operation of the . . . law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'" *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992)).

Berkeley has interfered with the Sea Scouts', including Petitioner's, speech for the purpose of promoting Berkeley's "politically correct" message and discouraging the message disfavored by Berkeley, the national BSA's policies. However, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.

The right to silence is constitutionally protected; one cannot be compelled to speak out or to disseminate government ideology. *Wooley*, 430 U.S. at 714-716; *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Private individuals have the right not to propound a particular point of view. *Hurley*, 515 U.S. at 575.

Further, government actions that unconstitutionally burden the freedom of association "may take many forms, one of which is 'intrusion into the internal structure or affairs of an association.'" *Dale*, 530 U.S. at 648 (quoting *Jaycees*, 468 U.S. at 623). By compelling the Sea Scouts to proselytize Berkeley's viewpoints to BSA—and thereby attempting to turn a Sea Scout unit of BSA against the national BSA organization—Berkeley impermissibly interfered with the internal structure and affairs of BSA and the Sea Scouts.

The California Supreme Court dismisses these requirements stating that had the City Council accepted the Waterfront Commission's recommendations of compelled speech to obtain a change in national BSA policy, the Sea Scouts "might with greater plausibility contend the conditions infringed their freedom of speech." App. A-19. This statement ignores the fact that the Sea Scouts had already been required to comply with the Waterfront Commission's demands as a condition of its recommendation. App. D-21, D-23-D-24. But even after this compelled speech was accomplished, the City Council voted to deny the Sea Scouts the continued free use of the Berkeley Marina facilities for the stated reason that the Sea Scouts were associated with the national BSA which has a policy of exclusion based on sexual orientation and atheism. App. A-6-A-7. The lower court's upholding of this compelled speech conflicts with this Court's decisions cited above.

D. The Decision Below Conflicts with This Court's Precedents on Unconstitutional Conditions

The decision below held that Berkeley's requirement that the Sea Scouts document a nonexclusionary membership policy in order to qualify for the free berth program was not an unconstitutional condition. App. A-16-A-19. In *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), this Court explained that

> even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which it could not command directly."

(Citations omitted.)

This Court has not hesitated to strike down restrictions on speech that were unrelated to any "programmatic message of the kind recognized in *Rust* [*v. Sullivan*, 500 U.S. 173 (1991)." *Legal Services Corp.*, 531 U.S. at 548. Thus in *Legal Services Corp.*, the government could not condition grants to lawyers serving indigent clients on their agreement to refrain from challenging the constitutionality of welfare laws, since the grant program was not designed "to promote a governmental message." *Id.* at 534.

This case is disturbingly like *Rosenberger*, 515 U.S. at 833-36, in which a student publication could not both accept public university funds and maintain its religious viewpoint. So here, Sea Scouts cannot accept the benefit of free-berthing and maintain their association with BSA because of the viewpoint of BSA. They must unequivocally agree to refrain from exercising their constitutionally protected association with BSA and its membership policies or forego the free-berthing benefit.

The California Supreme Court broke new ground by permitting a city to assert its own locally generated interest that supersedes federal constitutional rights. App. A-9. Allowing municipalities to create their own "compelling local interests" for conditioning benefits on the relinquishment of constitutional rights results in inconsistent levels of protection of constitutional freedoms around the country, with enforcement of and respect for constitutional rights varying from city to city, depending on the ideological inclinations of the local government. This subverts the "very purpose of a Bill of Rights," which is "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." *Barnette*, 319 U.S. at 638.

In *Dale*, this Court considered whether the State of New Jersey had a compelling interest which would support the application of its antidiscrimination laws to the Boy Scouts' membership policies—the same policies at issue here. This Court concluded that the "state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." *Dale*, 530 U.S. at 659.

Similarly, no local interest can justify Berkeley's infringement of the Sea Scouts' First Amendment rights. As this Court recognized in *Dale*, while local governments have the power to enact laws to combat discrimination against certain groups, the government has no legitimate interest in using those

laws to regulate the membership policies of private, expressive organizations. 530 U.S. at 658-59. This is in direct contrast to the interest the government has in upholding fundamental national policies. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (noting government's "fundamental, overriding interest in eradicating racial discrimination in education").

By contrast with *Bob Jones*, where national policy against racial discrimination had been shown by significant, sustained action by all three branches of government, there is no evidence of any policy supporting the regulation of the membership of private, expressive associations. Instead, the decisions of this Court, *see Dale*, and the actions of Congress, *see* 20 U.S.C. § 7905(b)(1), unequivocally support the right of Boy Scout groups to maintain their membership policies free from governmental interference. Accordingly, this Court in *Dale* has rejected the California court's holding that a local interest justifies the infringement of the Sea Scouts' First Amendment associational rights.

E. The Decision Below's Disregard of Petitioner's Fourteenth Amendment Equal Protection Rights Conflicts with the Decisions of This Court

1. The Decision Below Ignores the Fact That the Berkeley Resolution Was Targeted to Punish the Sea Scouts

Because of Berkeley's animus toward the viewpoints and membership policies of the BSA, Berkeley enacted a free berths program resolution intended to punish the Sea Scouts, including Petitioner, solely because of their association with the BSA. App. A-6-A-7; App. D-11.

The court below shrugged off statements by Berkeley officials of their intent to punish the Sea Scouts or

BSA for BSA's policies. App. A-24-A-25 and n.10. This is in direct conflict with this Court's decision in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). There this Court held that in equal protection cases, the City Council's object could be determined from, among other things, contemporaneous statements made by members of the decision making body. *Id.* at 540. This Court found that the ordinances were enacted because of, not merely in spite of, their suppression of the petitioners' religious practices as shown by the statements of various city officials. The ordinances were therefore not neutral. *Id.* at 541-42. Because the statements by Berkeley city officials showed that the city's denial of the free-berthing was intended to suppress the Sea Scouts' and BSA's First Amendment rights, the decision below conflicts with *City of Hialeah.*

2. The Decision Below Ignores the Fact That Berkeley Has Not Applied Its Marina Resolution in a Neutral Manner

The Sea Scouts in their April 8, 1998, letter promised in writing to

> continue to comply with . . . the laws of the State of California and the Berkeley Municipal Code—including Section 13.28.060 [prohibiting discrimination based on sexual orientation in city owned facilities, or services, such as the Marina] and City Council Resolution No. 58.850, N.S. [availability and use of the Berkeley Marina shall not be predicated upon a person's religion, sexual orientation and other factors].

App. A-4-A-5.

No other free-berth applicant at the Berkeley Marina was required to submit such a letter. The Sea Scouts were deliberately and specifically singled out and targeted by

Berkeley because of their association with an organization that Berkeley disliked. App. D-43. Indeed, other nonprofits, without ties to BSA, have been granted free use of the marina facilities without the same conditions imposed on Petitioners. App. D-21.

The "bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Romer v. Evans*, 517 U.S. 620, 634 (1996). *See also Lawrence*, 539 U.S. at 574. In none of the cases relied on by the court below, *Grove City*, 465 U.S. 555, *Bob Jones*, 461 U.S. 574, and *Regan*, 461 U.S. 540, did government target a group for punishment solely because of its association with an organization disfavored by the government.

This case is fundamentally different from *Grove City*, 465 U.S. 555, relied on by the California court, App. A-10-12. In *Grove City*, the college refused to sign a uniform, federally prescribed compliance statement stating it would comply with the Title IX requirements. 465 U.S. at 561. In contrast, the Sea Scouts *have* signed a "written assurance" of compliance with Berkeley's resolution and ordinance, as well as with the United States Constitution and California laws. App. A-4. But Berkeley kept changing its standards and demanding different things of the Sea Scouts. For instance, the Waterfront Commission accepted the Sea Scouts' written assurance as sufficient compliance on the condition that their April 8, 1998, letter be distributed to all Boy Scout members and persons associated with the Berkeley Sea Scout program and on the further condition that the Sea Scouts initiate a dialogue with the local BSA council on changing the national BSA policies regarding gays and atheists. App. D-20. No other free berth applicant was required to do anything comparable to this. App. D-21. Despite the Sea Scouts' compliance, the more ideologically driven Berkeley City Council rejected the Sea Scouts' application on the basis of their association with BSA. App. A-6-A-7, D-25.

The Equal Protection Clause precludes "intentional and arbitrary discrimination" by government even when the victims are not members of a traditionally suspect class. *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352 (1918). Government action that, in a targeted way, imposes a disability on a group of persons "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 634. Where legislation is motivated by "animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Id.* at 632. "'[I]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.' " *Id.* at 634 (citation omitted).

Because the decision below conflicts with the decisions of this Court on freedom of speech and association and equal protection, review should be granted pursuant to Rule 10(c) of this Court.

II

THE DECISION BELOW ADDS TO THE CONFLICT IN THE UNITED STATES COURTS OF APPEALS AS TO THE CONSTITUTIONALITY OF DISQUALIFYING POLITICALLY DISFAVORED ORGANIZATIONS FROM GENERALLY AVAILABLE PUBLIC BENEFITS

A. The Decision Below Upholding Berkeley's Viewpoint Discrimination Adds to the Existing Conflict in the Circuit Courts

The court below noted that Berkeley excluded the Sea Scouts from its program of free berthing for nonprofits "due to [BSA's] discriminatory policies against gays and atheists."

App. A-6. The court cited with approval the Second Circuit holding in *Boy Scouts of America v. Wyman*, 335 F.3d 80, 94 (2d Cir. 2003), that exclusion of BSA from the state's workplace charitable contribution campaign because of its membership policies was viewpoint neutral because the purpose was to protect persons from the economic and social harms of discrimination rather than to impose a price on the expression of BSA's point of view. App. A-14. In plain terms, both this case and *Wyman* punished BSA, and here the Sea Scouts, including Petitioner, because of their politically disfavored exercise of the right of association.

The holdings of the California Supreme Court in this case and of the Second Circuit in *Wyman* are in direct conflict with the holding of the Eighth Circuit in *Robb v. Hungerbeeler*, 370 F.3d 735 (8th Cir. 2004), *cert. denied, sub nom. Rahn v. Robb*, 543 U.S. 1054 (2005) (*Robb*). There the Eighth Circuit ruled that the State of Missouri, in requiring a local unit of the Knights of the Ku Klux Klan to abandon its racially restrictive membership policy as a condition of participating in the state's Adopt-A-Highway program, violated that group's constitutionally protected right of association. *Id.* at 738, reaffirming its earlier holding in *Cuffley v. Mickes*, 208 F.3d 702, 704, 708-10 (8th Cir. 2000), *cert. denied, sub nom. Yarnell v. Cuffley*, 532 U.S. 903 (2001).

In *Cuffley*, the state denied the Klan's participation on the basis that the Klan did not satisfy a state regulation requiring that "[a]pplicants must adhere to the restrictions of all state and federal nondiscrimination laws. Specifically, the applicant must not discriminate on the basis of race, religion, color, national origin or disability. Such discrimination disqualifies the applicant from participation in the program." 208 F.3d at 708 (citation omitted). The Eighth Circuit found that this law's "direct application to the Klan in this case would violate the Klan's freedom of political association." *Cuffley*, 208 F.3d at 708.

The court concluded that "viewpoint-based exclusion of any individual or organization from a government program is not a constitutionally permitted means of expressing disapproval of ideas—even very poor ideas—that the government disfavors." *Id.* at 712.

The Eighth Circuit followed up in *Robb*, holding that requiring the Klan to refrain from racial discrimination constituted an "unconstitutional condition on the Klan's participation in the Adopt-A-Highway program." *Robb*, 370 F.3d at 739 (citation omitted). The Eighth Circuit found that such a regulation is likely to be applied selectively by the state and that no organization other than the Klan ever had its application denied based on this regulation. *Robb*, 370 F.3d at 743-44. (Berkeley similarly has enforced its policy only against the Sea Scouts. App. D-21; D-45.) The Eighth Circuit concluded that "the State may not deny [the Klan's] AAH application because it discriminates on the basis of race." *Robb*, 370 F.3d at 745.

If the State of Missouri could not exclude a group from generally available benefits because of its constitutionally suspect policies of discrimination based on race, surely the City of Berkeley may not exclude a group because of its association with the BSA and BSA's constitutionally protected membership policies. *Dale*, 530 U.S. 640. The decision below, as well as that of the Second Circuit in *Wyman*, is thus in direct conflict with that of the Eighth Circuit in *Robb* and *Cuffley*.

Similarly, the Fifth Circuit in *Knights of the Ku Klux Klan v. East Baton Rouge Parish Sch. Bd.*, 578 F.2d 1122, 1123 (5th Cir. 1978), overturned a school board's policy that denied the Klan the use of a high school gym for a Saturday night "patriotic meeting." The court framed the issue as to whether, consistent with the Constitution, a state agency could condition the use of public school facilities on the political or ideological view of the applicant or on its membership policies. *Id.*

at 1124. The court held that the public interest required "that unfashionable, even pernicious and mischievous, ideas should be admitted to the marketplace . . . . 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.' " *Id.* at 1127 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. at 642.

The Fifth Circuit criticized the school board for "franking those whose ideas and policies it finds suitable for public expression and gagging those it does not and this in the name of equal protection and civil rights." *Knights*, 578 F.2d at 1128. The decision below and that of the Second Circuit in *Wyman* are thus in direct conflict with the Fifth Circuit decision in *Knights*.

In *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997), the plaintiff organization of college students alleged that a state statute that prohibited any state college or university from spending public funds to sanction, recognize, or support any group that promotes lifestyle or action prohibited by sodomy and sexual misconduct laws violated the First Amendment. The organization had been denied funding by the school officials based on that statute. *Id.* at 1545-46.

The Eleventh Circuit found this Court's decision in *Rosenberger* dispositive, quoting Justice Kennedy's majority opinion, 515 U.S. at 829:

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the

> restriction. These principles provide the framework forbidding the State [from] exercis[ing] viewpoint discrimination, even when the limited public forum is one of its own creation.

Pryor, 110 F.3d at 1549 (citations omitted).

The Eleventh Circuit's holding that viewpoint discrimination is impermissible in the provision of government benefits, *Pryor*, 110 F.3d at 1549, conflicts with the decision below that upholds Berkeley's exclusion of the Sea Scouts, including Petitioner, based on the politically disfavored viewpoint of the BSA.

B. The Decision Below Adds to the Conflict in the Circuit Courts as to Suppression of Speech and Association for Punitive Reasons

The court below disregarded Petitioner's allegations that members of the Berkeley City Council and other city officials expressed the intent to punish the Sea Scouts for BSA's policies. App. A-23-A-25. Specifically, two City Council members made clear that they intended to take punitive actions against the Sea Scouts in an attempt to overturn BSA's national policies. *Id.* at App. A-24-A-25 n.10. Further, Berkeley city officials

> indicated the city should and would deny the Sea Scouts continued benefits in order to discourage BSA from maintaining its disfavored policies and to retaliate for BSA's expulsion of Timothy Curran (the plaintiff in *Curran v. Mount Diablo Council of the Boy Scouts*, . . . , 17 Cal. 4th 670 [1998]) pursuant to those policies.

App. A-24-A25 n.10.[1]

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[1] This Court held in *Church of the Lukumi Babalu Aye, Inc. v. City* (continued...)

The Eighth Circuit found in *Robb* that the regulation in issue was promulgated in response to the holding in *Cuffley* that exclusion of a Klan group pursuant to a prior regulation was unconstitutional and the fact that the Klan was the only group that it has ever been used to exclude, strongly suggested that it had been used as a pretext to target the Klan group in a viewpoint-discriminatory manner. *Robb*, 370 F.3d. at 744. *Robb* further held that the state "failed to make any legitimate showing that [the Klan] violates its requirements, and this leads us to find that the State is using the regulation as a smokescreen to justify excluding [the Klan] because of its controversial political views." 370 F.3d at 740. As that court noted, "Because the State's proffered reason for excluding [the Klan] lacks any sort of plausible evidentiary support, we think it manifest that the exclusion was motivated by the State's discriminatory animus against [the Klan's] views." *Id.* at 741.

Similarly here, the lower court found that "the Sea Scouts have never actually discriminated against anyone on the basis of sexual orientation or religion." App. A-2. Under *Robb*, this strongly suggests that the Berkeley policy "has been used as a pretext to target the [Sea Scouts] in a viewpoint-discriminatory manner." 370 F.3d at 744. As in *Robb*, this makes "manifest that the exclusion was motivated by [Berkeley's] discriminatory animus against [BSA's] views." *Id.* at 741. The California court's disregard of Berkeley's motivating animus conflicts directly with the Eighth Circuit's holding in *Robb*.

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[1] (...continued)
of Hialeah, 508 U.S. at 540, contemporaneous statements made by city officials are relevant in determining the true object of the city council's ordinances.

C. In Approving the Singling Out of the Sea Scouts for Exclusion Based on Viewpoint, the Decision Below Adds to the Conflict in the Circuit Courts

The court below held that the fact "[t]hat other groups, which were not part of BSA, were not required to give local policy statements assuring nondiscrimination does not show unequal treatment." App. A-20. And indeed, other groups such as the Cal Sailing Club, the Nautilus Institute, and the Berkeley Yacht Club were permitted free berths without making the same promises that were demanded of the Sea Scouts. App D-21. Thus, Berkeley applied its policy of specific nondiscrimination assurances only to the Sea Scouts and only because they exercised their First Amendment right to freedom of expressive association in a manner Berkeley disagrees with.

The Second Circuit in *Wyman* similarly disregarded BSA's argument that the state neither investigated nor excluded other organizations that served persons of a particular sex, age, ethnicity, race, or sexual orientation. 335 F.3d at 95-96. Other federal circuits have found that the singling out of a group for disfavored treatment based on the exercise of constitutional rights is a clear violation of law. In *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 334 F.3d 796, 802 (9th Cir. 2003), the Ninth Circuit reversed the dismissal of a claim alleging an equal protection violation based on a county's singling out the plaintiff for unfavorable conditions and fees in retaliation for his exercise of First Amendment rights; and *Massie v. Inland Boatmen's Union of the Pacific*, 886 F.2d 1188, 1190-91 (9th Cir. 1989), reversed dismissal of a claim for selective enforcement based on the plaintiff's exercise of constitutional rights.

In *Cuffley*, the Eighth Circuit found that the fact that the government did not ask any organization other than the Klan about their membership criteria, nor investigate their

membership criteria, indicated that the denial of Klan participation was pretextual. 208 F.3d at 711. The Eighth Circuit therefore found that the denial of the Klan's application was based on the Klan's beliefs and advocacy and that "[s]uch interference with constitutional rights was impermissible." *Id.* (citation omitted).

Because the decision below adds to the conflict between the Second Circuit and the Fifth, Eighth, Ninth, and Eleventh Circuits, review should be granted, pursuant to Rule 10(b) of this Court.

III

THIS CASE INVOLVES IMPORTANT ISSUES OF LAW REGARDING THE CONSTITUTIONALITY OF WITHHOLDING GENERALLY AVAILABLE BENEFITS FROM POLITICALLY DISFAVORED ORGANIZATIONS

The decision below, in upholding Berkeley's punishment of the Sea Scouts based solely on their First Amendment right of association, sets an ominous precedent for other organizations affiliated with BSA and any other group whose views government disfavors. The California Supreme Court decision imperils the rights of thousands of California-based Boy Scouts, Cub Scouts, Sea Scouts, their parents, and volunteering adults; it declares them to be second class citizens for purposes of obtaining generally available government benefits, solely because of their desire to associate with BSA.

Indeed, the ruling below gives local governments an ominous power to chill the First Amendment rights of any disfavored group by imposing punitive and unequal treatment on organizations whose views or affiliations are considered "politically incorrect." This precedent would permit members of churches, mosques, or synagogues to be charged more for

use of a city swimming pool if their church policy required a belief in God or disfavored homosexuality. Indeed, under the lower court's rationale that local nondiscrimination policies outweigh First Amendment rights, California government entities can ban altogether the use of government properties by organizations such as religious groups that have restrictive membership policies.

The California Supreme Court has followed a current trend in judicial authorization of government penalties against disfavored organizations. In *Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane*, No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. Apr. 17, 2006), the district court ruled that the University of California's Hastings School of Law may deny funding as well as official recognition to a Christian student club that requires its members to sign a statement of faith and not engage in homosexual conduct. Another district court has ruled that the City of San Diego's lease of park property to the Boy Scouts violates the federal Establishment Clause because the Scout's core principles include belief in God. *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259, 1273, 1276 (S.D. Cal. 2003). The decision has been appealed to the Ninth Circuit.

The Oregon Court of Appeals interpreted a state anti-discrimination law to bar the Boy Scouts (but not other community organizations with different beliefs) from making informational presentations on public school grounds during the school day. *Powell v. Bunn*, 108 P.3d 37 (Or. Ct. App. 2005), *review granted* by Oregon Supreme Court.

Because the issue of government withholding of benefits from disfavored organizations is an important, continuing, and increasing one, review of the decision below should be granted pursuant to Rule 10(c) of this Court.

CONCLUSION

The conflict presented by the decision of the California Supreme Court is unmistakable. The California court has ignored or rejected the decisions of this Court and added to the conflict in the United States Circuit Courts of Appeals as to the constitutionality of withholding of government benefits from disfavored organizations. Petitioner respectfully urges this Court to grant this petition for writ of certiorari.

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Respectfully submitted,

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Filed 03/09/06

IN THE SUPREME COURT OF CALIFORNIA

EUGENE EVANS et al.,	)	
	)	
Plaintiffs and Appellants,	)	
	)	S112621
v.	)	
	)	Ct. App. 1/5 A097187
CITY OF BERKELEY et al.,	)	
	)	Alameda County
Defendants and Respondents.	)	Super. Ct. No. 809180-4
	)	

A city requested that a volunteer youth group affiliated with the Boy Scouts of America, in order to qualify for continued free use of berths in the city's marina, provide written assurance the group would not discriminate against homosexuals or atheists wishing to participate in the group's program. The city, deeming the policy statement the group provided ambiguous and therefore insufficient, discontinued its subsidy. Members of the group sued, claiming, among other things, that the city's action violated their freedoms of speech and association. The trial court sustained the city's demurrer, and the Court of Appeal affirmed. We conclude the Court of Appeal correctly determined that the complaint does not establish a violation of plaintiffs' constitutional rights and affirm the lower court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Because this case comes to us on a demurrer for failure to state a cause of action, we accept as true the well-pleaded allegations in plaintiffs' first amended complaint. "'We treat the demurrer as admitting all material facts properly pleaded,

but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' (*Serano v. Priest* (1971) 5 Cal. 3d 584, 591 [96 Cal. Rptr. 601, 487 P.2d 1241, 41 A.L.R. 3d 1187].) Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal. 2d 34, 42 [172 P.2d 867].)" (*Blank v. Kirwan* (1985) 39 Cal. 3d 311, 318.) "'[A] complaint otherwise good on its face is subject to demurrer when facts judicially noticed render it defective.' [Citation.]" (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal. App. 3d 369, 374; *see* Code Civ. Proc., § 430.30, subd. (a).) The following facts appear from the allegations of the complaint and from judicially noticeable sources.

Plaintiffs are 14 individual adult and youth participants in the Berkeley Sea Scouts, suing for themselves and other program participants. The Berkeley Sea Scouts (Sea Scouts) are volunteers joining together in a nonprofit association with no formal administrative structure, no budget, and no employees. Adults, including some of the named plaintiffs, use Sea Scout vessels to teach sailing, seamanship, marine engine repair, electrical repair, woodworking, and other skills for a maritime career, as well as teamwork, to teenagers who pay no more than $7 a year to participate. Ethnic diversity is a hallmark of the Sea Scouts, and many youth participants are economically disadvantaged. Girls as well as boys participate, and the Sea Scouts have never actually discriminated against anyone on the basis of sexual orientation or religion.

According to the operative complaint, the Sea Scouts are "a subdivision of," or "associated/affiliated with," the national Boy Scouts of America (BSA). The Sea Scouts operate under what the complaint describes as BSA's "regional office," the Mount Diablo Council. Each Sea Scout "ship" functions as the equivalent of a Boy Scout troop. BSA provides the group with

a low-cost maritime liability insurance policy but gives it no direct funding. BSA, according to the complaint, follows a "policy of discriminating against homosexuals' and atheists' participation."[1]

In the late 1930's, Berkeley began giving BSA one or more free berths at its marina for use by the Sea Scouts, after the Mount Diablo Council permitted Berkeley to quarry rock from BSA property to build the marina and breakwater. The arrangement was formalized by city resolutions in 1945 and 1969 that required compliance with marina rules and regulations and allowed revocation on 30 days' written notice.

In March 1997, in response to requests from other nonprofit organizations for free berths, the city manager recommended and the Berkeley City Council adopted through resolution No. 58,859-N.S. (Resolution 58,859) a uniform policy for awarding free berths to nonprofit community service organizations.[2] Under the resolution, an organization seeking

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[1] The complaint cites *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal. 4th 670, and *Boy Scouts of America v. Dale* (2000) 530 U.S. 640, both of which describe BSA's doctrinal opposition to participation in scouting programs by atheists and known homosexuals.

[2] Resolution 58,859 is a "legislative enactment[] issued by or under the authority of . . . [a] public entity in the United States," of which notice may be taken under Evidence Code section 452, subdivision (b). (See *Cooke v. Superior Court* (1989) 213 Cal. App. 3d 401,416 [county resolution increasing level of dental care for indigents], disapproved on another point in County of *San Diego v. State of California* (1997) 15 Cal. 4th 68, 106, fn. 30.) The operative complaint also alleges the existence and some of the terms of the resolution. We also take notice, as legislative history reflecting on the purposes of the enactment, of the city manager's memorandum

(continued...)

free berth space must "supply a beneficial public service," the benefit of which "greatly exceeds the value of the berth." The organization also must "demonstrate," through "[m]embership policy and practices," among other criteria, that it "promote[s] cultural and ethnic diversity." Resolution 58,859 goes on to specify that access to marina facilities may "not be predicated on a person's race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability or medical condition." The resolution provides for the Berkeley Waterfront Commission (Waterfront Commission) to review applications and make recommendations to the city council. Organizations receiving berthing subsidies are to have those subsidies reviewed annually by the city council after a review and recommendation by the Waterfront Commission.

The continued provision of free marina berths to the Sea Scouts came up for review in the Waterfront Commission in early 1998. The commission expressed concern that BSA's policy of discrimination against homosexuals and atheists was in conflict with Resolution 58,859 and asked the Sea Scouts to provide a "local policy statement" ensuring nondiscrimination. The Sea Scouts, in negotiation with the Mount Diablo Council, approved a policy statement intended to satisfy Berkeley's requirements. In a letter to the waterfront manager, dated April 8, 1998, the Sea Scouts stated: "We will continue to comply with the Constitution of the United States of America, the laws of the State of California and the Berkeley Municipal Code—including Section 13.28.060 and City Council Resolution No. 58,85[9], N.S. [¶] . . . We actively recruit adult leaders and adolescents meeting the minimum age requirements

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[2] (...continued)
to the mayor and city council recommending the resolution's adoption. (See *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal. 4th 824, 848, fn. 6; *Elsner v. Uveges* (2004) 34 Cal. 4th 915, 929 & fn. 10.)

without regard to sex, race, color, national origin, political affiliation, religious preference, marital status, physical handicap or medical condition. We believe that sexual orientation is a private matter, and we do not ask either adults or youths to divulge this information at any time."[3]

The Waterfront Commission recommended the city council continue the Sea Scouts' free berths. The city manager, however, recommended the council discontinue the free berths, based on an opinion by the city attorney concluding that continuation of the free berth subsidy to the Sea Scouts would violate both Resolution 58,859 and section 13.28.060 of the Berkeley Municipal Code, which prohibits discrimination based on sexual orientation in the use of city owned or supported facilities and services.[4]

In her opinion, which was provided to the council with the city manager's recommendation, the city attorney concluded the Sea Scouts' April 8, 1998, letter did not constitute compliance with Resolution 58,859 or Berkeley Municipal Code section 13.28.060. In the city attorney's view, the Sea Scouts' assertion in the April 8 letter that they considered sexual orientation to be "a private matter" did not state a policy that the group would

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[3] The text of the Sea Scouts' April 8, 1998, letter appears in the appellate record only in plaintiffs' original complaint, which was superseded by amendment after the trial court granted judgment on the pleadings for Berkeley with leave to amend. Both parties, however, quote the letter's language in their briefing. The superseded allegation, it thus appears, was not made by mistake or inadvertence, and no potential dispute exists as to the letter's language, allowing its consideration on demurrer. (See *Reichert v. General Ins. Co.* (1968) 68 Cal. 2d 822, 836; *Joslin v. H.A.S. Ins. Brokerage*, *supra*, 184 Cal. App. 3d at p. 375.)

[4] Regarding judicial notice of the city attorney's opinion, see footnote 5, post.

not, in the future, discriminate on the basis of sexual orientation. According to the city attorney, the Sea Scouts said they were unwilling to state such an express policy "due to fear of losing their charter from the Boy Scouts." From her examination of this court's then recent opinion in *Curran v. Mount Diablo Council of the Boy Scouts*, *supra*, 17 Cal. 4th 670, and her discussion with BSA's attorney in that case, the city attorney concluded that BSA requires local groups to adhere to its policy of excluding avowedly gay or atheistic members or adult leaders, even where a local nondiscrimination law requires otherwise. In light of BSA's policy, the city attorney concluded, the qualified language of the April 8 letter was insufficient to show compliance with Berkeley's ordinance and resolution.

The Berkeley City Council took up the matter on May 5, 1998. According to plaintiffs' complaint, at the May 5 meeting the city council was "made aware" that the Sea Scouts had never discriminated against gays or atheists and that the Sea Scout program served an ethnically and economically diverse group of young people. The city council nevertheless voted to end the berth subsidy.

According to the minutes of the May 5 council meeting, the free berths were discontinued "due to [BSA's] discriminatory policies against gays and atheists."[5] In a letter

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[5] Berkeley asserts the minutes are noticeable as a legislative enactment (Evid. Code, § 452, subd. (b)) and the city attorney's opinion is noticeable as legislative history reflecting on the basis for that enactment. Plaintiffs do not dispute the former point and quote the minutes' statement of the reason for denial at least twice in their brief, which we take as a concession the minutes may be considered on review of the demurrer. In their reply brief, plaintiffs object to the city attorney's opinion on the ground it contains hearsay regarding BSA's policies, but that objection does not reach the facts

(continued...)

giving the Sea Scouts notice their free berths were cancelled, the Berkeley Waterfront Manager indicated the city council had denied free berths to the Sea Scouts because, in the complaint's words, the Sea Scouts "were associated with the national Boy Scouts of America organization which has a national policy of discriminating based on sexual orientation and atheism."

Because of its hostility to BSA, plaintiffs allege, Berkeley "decided to punish and intentionally discriminated against the completely innocent children and community volunteer[s]" of the Sea Scouts. Berkeley allegedly knew plaintiffs had, in the April 8, 1998, letter, "agreed not to discriminate against gays or atheists." The city used "[g]uilt by association," excluding plaintiffs from the free berth program solely because of BSA's policies, without ever determining that the Sea Scouts themselves "pose[d] the threat feared by the government"—discrimination in the use of publicly owned facilities. "Here, there is no evidence that Plaintiffs or any participant in the Berkeley Sea Scouts program was going to unlawfully discriminate against anyone, yet they have been penalized by the deprivation of the continued free use of the public facilities."

Plaintiffs allege the exclusion of the Sea Scouts from the free berth program violated their rights of free speech and association and constituted a denial of due process and equal protection of the laws. These deprivations of constitutional rights are claimed to be violations of state and federal civil rights laws, including Civil Code sections 51, 52, and 52.1, and

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[5] (...continued)
for which notice is sought: that the city attorney concluded continuing free berths would violate the city's resolution and ordinance and conveyed that opinion to the city manager and council. In the absence of a sound objection, we take notice of the opinion as well as the minutes.

title 42 United States Code section 1983. Plaintiffs seek damages reflecting the value of berths they were unable to afford to continue using, the rental they have paid and will pay for the berth they still use, emotional distress, and consequential losses. The complaint does not pray for injunctive or declaratory relief.

The trial court sustained Berkeley's demurrer to the amended complaint without leave to amend. The Court of Appeal affirmed, reasoning that plaintiffs had merely been denied a city subsidy "because they declined to adhere to Berkeley's nondiscrimination policy." Berkeley had not "attempted to muzzle anyone's speech" or force the Sea Scouts to sever their association with BSA, but had only "conditioned a city subsidy on compliance with nondiscrimination principles."

We granted plaintiffs' petition for review.

DISCUSSION

Plaintiffs contend Berkeley violated their rights of free association, speech, and equal treatment under the law by punishing them for being part of BSA despite their having never violated Berkeley's antidiscrimination laws and having "solemnly promised" not to do so in the future. The Court of Appeal, plaintiffs argue, erred in holding Berkeley had properly conditioned the subsidy on compliance with nondiscrimination laws because plaintiffs "have *agreed to comply.*" The lower court and Berkeley, plaintiffs maintain, "*are refusing to take . . . yes for an answer.*"

Berkeley, in contrast, argues that it may place nondiscrimination conditions on government funding without violating rights of speech and association, and insists it properly denied continued free berthing solely because the Sea Scouts

were unable to provide adequate assurances of future nondiscrimination, assurances Berkeley reasonably demanded in light of the known policies of BSA, of which the Sea Scouts are a part.

We agree with Berkeley and the Court of Appeal that a government entity may constitutionally require a recipient of funding or subsidy to provide written, unambiguous assurances of compliance with a generally applicable nondiscrimination policy. We further agree Berkeley reasonably concluded the Sea Scouts did not and could not provide satisfactory assurances because of their required adherence to BSA's discriminatory policies.

I. Berkeley Could Constitutionally Demand Sufficient Guarantees of Nondiscrimination

Berkeley's requirement that an individual or group receiving a city subsidy in the form of free berths in the Berkeley Marina agree in advance to administer its program without invidious discrimination did not infringe on plaintiffs' speech or associational rights. In order to meet the city's mandate of nondiscriminatory participation policies, the Sea Scouts were required neither to espouse nor to denounce any particular viewpoint nor to form or break any association or affiliation, but only to assure Berkeley of their adherence to the city's policies in connection with subsidized use of Berkeley's facilities.

Under the decisions of the United States Supreme Court, that Berkeley's nondiscrimination requirement applied only to programs assisted by a city subsidy, in the form of free berths at the marina, is virtually dispositive. The high court has generally approved, against First Amendment challenges, programs of governmental financial assistance that limit the expressive activities for which the funds may be used.

In the leading case of *Rust v. Sullivan* (1991) 500 U.S. 173, the court rejected a First Amendment challenge to regulations prohibiting abortion counseling in programs supported by federal family planning funds. "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. '[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.' [Citations.]" (*Id.* at p. 193.)

In restricting the range of counseling and advocacy in which programs receiving federal funding could engage, the government had not denied the grantees the right to engage in abortion-related activities. "Congress has merely refused to fund such activities out of the public fisc. . . ." (*Rust v. Sullivan*, *supra*, 500 U.S. at p. 198; accord, *United States v. American Library Assn., Inc.* (2003) 539 U.S. 194, 212 (plur. opn.) [statutory requirement that libraries receiving aid for Internet access use filtering software "does not 'penalize' libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. [The statute] simply reflects Congress' decision not to subsidize their doing so. To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance"]; *Regan v. Taxation With Representation of Wash.* (1983) 461 U.S. 540, 549 [denial of full tax-exempt status to an organization that engages in substantial lobbying activities does not infringe on freedom of speech: "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny"]; cf. *Locke v. Davey* (2004) 540 U.S. 712, 721 [scholarship program's exclusion of theology students does not violate First

Amendment's free exercise clause; provision of assistance to those pursuing secular education does not constitute a "'baseline'" against which denial of assistance to theology students must be deemed a burden on religion].)

The Supreme Court has applied these principles, in particular, to uphold, against First Amendment challenges, government rules limiting financial assistance to those organizations that agree in advance not to practice invidious discrimination in government-assisted programs. *Grove City College v. Bell* (1984) 465 U.S. 555 (*Grove City*) is the closest case on point. A federal statute required recipients of federal education funds to agree not to discriminate on the basis of sex in any program so funded. When the plaintiff college declined to provide an "Assurance of Compliance" with the statute, the federal Department of Education terminated a program of tuition assistance to the college and its students. (*Id.* at pp. 557-561.)

The *Grove City* plaintiffs attacked the statutory condition as, inter alia, a violation of their First Amendment rights, but the high court found the constitutional claim "warrants only brief consideration. Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept. *E.g., Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Grove City may terminate its participation in the [tuition aid] program and thus avoid the requirements of [the nondiscrimination provision]. Students affected by the Department's action may either take their [tuition aid] elsewhere or attend Grove City without federal financial assistance. *Requiring Grove City to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the [tuition aid] program infringes no First Amendment rights of the College or its students.*" (*Grove City*, *supra*, 465 U.S. at pp. 575-576, italics added; see

also *Bob Jones University v. United States* (1983) 461 U.S. 574, 602-604 (*Bob Jones*) [restrictive condition on charitable tax status, requiring lack of racial discrimination, did not infringe university's First Amendment right to freedom of religion because the compelling interest in preventing racial discrimination in education justified the policy's limited impact on exercise of religion: "Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets"].)[6]

Similarly, Berkeley, in conditioning free berths on a group's adoption of a nondiscriminatory membership policy, has not prohibited or penalized plaintiffs' exercise of speech or associational rights. In adopting Resolution 58,859 and applying it to end free berths for the Sea Scouts, the city did not purport to prohibit the scouts from operating in a discriminatory manner; it simply "refused to fund such activities out of the public fisc. . . ." (*Rust v. Sullivan*, *supra*, 500 U.S. at p. 198.) To the extent the Sea Scouts objected to compliance with Resolution 58,859, the organization (to paraphrase *Grove City, supra*, 465 U.S. at p. 575) was free to terminate its participation in the free berth program and thus avoid the requirements of the nondiscrimination provision; "a legislature's decision not to

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[6] Plaintiffs argue *Grove City* and *Bob Jones* govern only where eliminating a particular type of discrimination has been recognized as a "compelling national interest." The high court in *Grove City*, however, relied on no such compelling-interest analysis, holding simply that the government could attach "reasonable and unambiguous conditions" to financial assistance it offered private institutions. (*Grove City, supra*, 465 U.S. at p. 575.) The court did, in *Bob Jones, supra*, 461 U.S. at page 603, apply the compelling-interest test for free exercise claims, but it later held, in *Employment Div., Ore. Dept. of Human Res. v. Smith* (1990) 494 U.S. 872, 885, that such a justification was not required for neutral laws of general applicability.

subsidize the exercise of a fundamental right does not infringe the right" (*Regan v. Taxation With Representation of Wash., supra*, 461 U.S. at p. 549).

The Supreme Court has recognized two exceptions to its broad rule that the government's refusal to subsidize exercise of a First Amendment right does not infringe that right. Neither is applicable here.

First, a funding restriction that has as its purpose the suppression of a disfavored viewpoint—especially, but not only, where the government program at issue exists to create or foster a public forum—is subject to strict scrutiny. Invalidating a rule precluding federally funded legal services affiliates from challenging welfare laws, the Supreme Court explained: "Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest." (*Legal Services Corp. v. Velazquez* (2001) 531 U.S. 533, 548-549; see also *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) 515 U.S. 819, 832-834 [exclusion of journals promoting a particular set of religious viewpoints from program of financial assistance to student newspapers infringed student group's freedom of speech]; *Regan v. Taxation With Representation of Wash., supra*, 461 U.S. at p. 548 [refusal to subsidize lobbying would not come within the rule of permissibility "if Congress were to discriminate invidiously in its subsidies in such a way as to '"aim[] at the suppression of dangerous ideas"'"]; *Perry v. Sindermann* (1972) 408 U.S. 593, 595, 598 [college teacher's allegation that the administration's decision not to rehire him was based on his public criticism of its policies presented "a bona fide constitutional claim"]; *Speiser v. Randall* (1958) 357 U.S. 513, 518 ["denial of a tax exemption for engaging in

certain speech" infringes freedom of speech because it is '"frankly aimed at the suppression of dangerous ideas'"].)[7]

The exception for attempted suppression of a disfavored viewpoint is inapposite to the condition imposed here. In terminating the Sea Scouts' free berths because of the group's failure fully and unambiguously to promise future nondiscrimination, Berkeley did not demand adherence to or renunciation of any idea or viewpoint. A government that requires aid recipients to conform their actions to its laws does not thereby enforce adherence to the philosophy or values behind those laws. More specifically, to state, in applying for government funding, that one will not use the funding for a discriminatory program is not necessarily to state that one agrees with the government's nondiscrimination objective. Thus Berkeley, in requiring assurances that its subsidy and property will be used without discrimination on the basis of religion or sexual orientation, does not demand adherence to the *viewpoint* that motivated the nondiscrimination provision. (See *Boy Scouts of America v. Wyman* (2d Cir. 2003) 335 F.3d 80, 94 [exclusion of BSA from state's workplace charitable contribution campaign because of its discriminatory policies was viewpoint neutral in that nondiscrimination rule's purpose was "to protect persons from the . . . economic and social harms of discrimination" rather than "to impose a price on the expression of [BSA's] point of view"]; but see *Boy Scouts of America, South Florida v. Till* (S.D.Fla. 2001) 136 F.Supp.2d 1295, 1308 [exclusion of local council from off-hours use of

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[7] The restriction on speech of family planning grant recipients in *Rust v. Sullivan*, *supra*, 500 U.S. 173, might appear to fall logically within this exception, but the high court has since characterized the program in *Rust* as involving government promulgation of its own message, an enterprise in which the government enjoys even greater leeway than in the funding of private speech. (*Legal Services Corp. v. Velazquez*, *supra*, 531 U.S. at p. 541.)

public schools because of its adherence to BSA's discriminatory policy characterized as punishment of council for its "message"].)

Second, a restriction is suspect to the extent it goes beyond limiting the government funded expressive activity of the recipient and attempts further to limit expressive activities that are *not* government funded. In *Rust v. Sullivan*, *supra*, 500 U.S. at pages 196-197, the high court explained that funding restrictions previously held to constitute unconstitutional conditions had involved "a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program," but that a recipient of family planning funds could, despite the restrictions at issue, "continue to . . . engage in abortion advocacy . . . through programs that are separate and independent from" the federally assisted project. (See also *FCC v. League of Women Voters of California* (1984) 468 U.S. 364, 400 [invalidating rule precluding public broadcasting stations from editorializing, in part because under the rule a station that received only a small amount of its income from federal grants was "barred absolutely from all editorializing . . . . The station has no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity']; Sullivan, *Unconstitutional Conditions* (1989) 102 Harv. L. Rev. 1413, 1463-1467 [discussing "germaneness" as a limitation on government funding conditions].)

This exception, too, is inapplicable. Berkeley, in conditioning its free berths on the Sea Scouts' agreement not to engage in invidious discrimination, did not purport to control the exercise of speech or associational rights by the Sea Scouts or individual plaintiffs *outside* the Berkeley Marina program.

Even were the nondiscrimination assurance demanded by Berkeley regarded as a conditional burden on speech or association, its scope would be limited to the very program subsidized by the city. As in *Rust v. Sullivan*, *supra*, 500 U.S. 173, and *Regan v. Taxation With Representation of Wash.*, *supra*, 461 U.S. 540, plaintiffs here would be free to exercise their expressive or associational rights fully in any program not funded by public money. Federal high court precedent thus fails to support plaintiffs' constitutional claims.

Plaintiffs also contend that by conditioning free berths on adequate assurance of nondiscrimination, Berkeley has established an unconstitutional condition under the decisions of this court. We disagree.

In *Danskin v. San Diego Unified Sch. Dist.* (1946) 28 Cal.2d 536, this court held invalid on First Amendment grounds a statutory and regulatory scheme that permitted the use of school facilities for the meetings of private groups but excluded "subversive elements." We explained that while "[t]he state is under no duty to make school buildings available for public meetings" (*id.* at p. 545), having done so it could not constitutionally "demand tickets of admission in the form of convictions and affiliations that it deems acceptable" (*id.* at p. 547). We reiterated this principle in *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal. 2d 499, 504, explaining that "the power of government, federal or state, to withhold benefits from its citizens does not encompass a supposed 'lesser' power to grant such benefits upon an arbitrary deprivation of constitutional right." At the same time, we emphasized that some such conditions on public benefits were justifiable; we articulated a test of justification focusing on how germane and well-tailored the condition is to the purpose of the legislation establishing the benefit and whether the utility of imposing the condition outweighs the impairment of constitutional rights. (*Id.* at pp. 505-507; see also *Committee to*

Defend Reproductive Rights v. Myers (1981) 29 Ca1. 3d 252, 265-266.)

To apply these principles governing conditions on public benefits here, we need not decide whether Berkeley had adequate justification for its condition, as the condition—the giving of adequate assurances of nondiscrimination—did not demand or preclude the exercise of any speech or associational right by plaintiffs. Plaintiffs repeatedly disavow, both in their complaint and in their briefs in this court, any desire to discriminate on the basis of sexual orientation or religion. They therefore cannot, and do not, claim that Berkeley, by requiring them to refrain from such discrimination as a condition of the free berths, is restricting their freedom to limit their membership for purposes of expressive association. (Cf. *Boy Scouts of America v. Dale*, *supra*, 530 U.S. 640; *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995) 515 U.S. 557.) Indeed, plaintiffs, in their briefing, explain why this is a misconstruction of their claims: "Berkeley suggests that Petitioners challenge the condition as 'forc[ing] inclusion' of homosexuals and atheists in their ranks. Obviously this is not so, because Petitioners do not discriminate."

Berkeley's requirement that the Sea Scouts document a nondiscriminatory membership policy in order to qualify for the free berth program also did not condition receipt of a public benefit on the Sea Scouts' giving up their right to be a part of BSA. In requiring assurances of nondiscrimination, Berkeley did not in any way demand, even as a condition of the free berths, that the Sea Scouts quit BSA. To the extent compliance with the city's requirement would have that effect, it would be by the choice of a third party, BSA. Were BSA, that is, to cut its ties with a local scouting program because the program made assurances of nondiscrimination to a local government, the decision to sever the association would be BSA's, not the

government's. We are aware of no authority for the extraordinary proposition that government infringes on associational rights by offering one group a financial benefit that, if accepted, could lead another group to sever its association with the recipient.[8]

Nor, as already discussed, did Berkeley's requirement that free berth recipients have nondiscriminatory membership policies require the Sea Scouts, as a condition of the subsidy, to adopt an antidiscrimination viewpoint or repudiate BSA's discriminatory philosophy (a philosophy the Sea Scouts, in any event, expressly state they do not share). We therefore do not agree with plaintiffs that by conditioning free berths on the Sea Scouts' statement of a local nondiscrimination policy, the city compelled them to "renounce" BSA's positions and to "advocate and disseminate" Berkeley's own philosophy. As already explained, to condition a public benefit on assurances of nondiscrimination is not to compel advocacy of a viewpoint.

The complaint alleges Berkeley attempted to compel the Sea Scouts to subscribe to a "pledge of fealty" or "loyalty oath" according with Berkeley's antidiscrimination values. On analysis, however, these general claims provide no valid grounds for a claim of unconstitutionality. The only *facts* alleged regarding such a coerced statement of viewpoint concern the Waterfront Commission's request for a local policy statement of nondiscrimination. The Sea Scouts, according to the complaint, provided such a statement in their letter of April 8, 1998. This satisfied the Waterfront Commission, which recommended continuation of the free berths, albeit on conditions that the letter be distributed to program participants and that the Sea Scouts initiate a dialogue with the Mount

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[8] In part II of the discussion, *post*, we reject plaintiffs' additional argument that Berkeley has infringed their associational rights by *punishing* them for being affiliated with BSA.

Diablo Council on obtaining a change in the national BSA policy. Had the Berkeley City Council accepted the Waterfront Commission's recommendation and imposed these conditions on continuation of the free berths, plaintiffs might with greater plausibility contend the conditions infringed their freedom of speech. But the city council *rejected* the Waterfront Commission's recommendation, instead accepting the city manager's and city attorney's recommendation that the subsidy be discontinued because the April 8 letter was an insufficient assurance of nondiscrimination. The city council's action mooted any claim that the conditions proposed by the Waterfront Commission were unconstitutional.

II. Plaintiffs Have Not Been Punished for Associating with BSA

Relying on *Healy v. James* (1972) 408 U.S. 169, plaintiffs contend they have been subjected to a judgment of "'guilt by association'" in that Berkeley had no reason to believe the Sea Scouts themselves "'pose[d] the threat [of discrimination] feared by the Government,'" but rather assumed they discriminated simply because of their affiliation with BSA. (*Id.* at p. 186.) Berkeley's denial of free berths was arbitrary and unjustified by its nondiscrimination purpose because, plaintiffs contend, it "punishes innocent children, and their adult leaders, who are not engaged in the discrimination that Berkeley claims to be battling." In a related claim, they argue they were denied equal protection of the laws in that they were treated differently from other nonprofit community service organizations using the marina, solely because of their association with BSA. Again, we disagree.

The Sea Scouts are a part of BSA, an organization whose official policy excludes homosexuals and atheists from participation. That Berkeley officials were unaware of any past discrimination by the Sea Scouts does not mean none would

occur in the future. To require of a group operating as part of an organization with an official policy of discrimination that it agree in advance not to discriminate in the use of the city's free marina berths is a reasonable and narrowly tailored step to implement the diversity and nondiscrimination provisions of Resolution 58,859. That other groups, which were not part of BSA, were not required to give local policy statements assuring nondiscrimination does not show unequal treatment.

When the city asked the Sea Scouts to document that their local policy differed from BSA's, the Sea Scouts negotiated with BSA over such a policy, but, as their attorney explained to the trial court, "They couldn't say the words 'We do not discriminate on the basis of sexual discrimination [*sic*: orientation],' because the Boy Scouts objected." According to the attorney, BSA told plaintiffs, "You can't say you don't discriminate based on sexual orientation."

At oral argument in this court, plaintiffs, through their attorney, expanded on these concessions. When asked by the court what plaintiffs' course of action would be if an "openly and avowedly gay" person sought to participate in the Sea Scouts program, counsel responded, "If the Boy Scouts forbid it, it wouldn't happen. . . . [I]f the Boy Scouts came down on us, we would have to exclude that person." Asked whether plaintiffs and BSA were "one and the same" with regard to potential discrimination, counsel replied, "Essentially," and explained that while BSA and the Sea Scouts were "different organizations, . . . we are bound by what the Boy Scouts tell us we have to do." We accept these concessions by plaintiffs as establishing, even as against any contrary allegation or implication of the complaint, that the Sea Scouts could not, consistent with the limitations imposed on them by BSA, truthfully state they would not in the future discriminate against openly gay or atheistic participants. (See *DeRose v. Carswell* (1987) 196 Cal. App. 3d 1011, 1018-1019 [concessions of the

plaintiff's attorney before trial court negate contrary allegations for purposes of demurrer]; cf. *Browne v. Superior Court* (1940) 16 Cal.2d 593, 599 [the petitioner's concessions at oral argument negate contrary allegations in the habeas corpus petition]; *Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal. App. 4th 1468, 1474, fn. 6 [admissions in the plaintiffs' appellate brief negate statements in declarations for summary judgment purposes].)[9]

Because of the restrictions enforced by BSA, the April 8, 1998, letter was ambiguous as to how the Sea Scouts would treat an avowedly gay or atheistic participant. The Sea Scouts' statement that they would obey city law implied they would not discriminate on the basis of sexual orientation or religion, as city law forbade such discrimination. But the

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[9] In light of plaintiffs' concessions that the Sea Scouts could not unequivocally state they would not discriminate against gay and atheistic participants and that they would have to follow BSA's discriminatory policy if the occasion arose, their reliance on *Robb v. Hungerbeeler* (8th Cir. 2004) 370 F.3d 735 is misplaced. In that case, the State of Missouri claimed it had properly excluded a local unit of the Knights of the Ku Klux Klan from the state's Adopt-A-Highway program because of the group's judicially noticed history of violence. (*Id.* at p. 740.) The court of appeals found the state's rationale for exclusion "rings hollow" (*ibid.*) because the judicially noticed history of violence related generally to organizations named Knights of the Ku Klux Klan rather than specifically to the local unit or its organizers (*id.* at p. 741). "The mere fact that an applicant's organizational name includes certain widely-used language that has been used in the past by groups for which judicial notice has been taken of having a history of violence is inadequate to demonstrate that the applicant itself violates the dictates of the regulation." (*Ibid.*) The Sea Scouts, who according to the complaint form a subdivision of BSA, whose statement of local policy was limited by BSA dictates, and who, plaintiffs concede, must follow BSA's discriminatory policy, obviously share more than a coincidence of nomenclature with the national organization.

subsequent statement that the Sea Scouts recruit without regard to a list of factors including race, sex, and "religious preference," but *not* including sexual orientation or religion as such, implied, to the contrary, that the group would disfavor potential participants who were known to be gay or who "prefer[red]" *no* religion. Finally, the Sea Scouts' statement that they viewed sexual orientation as a "private matter" they do not ask participants to "divulge" strongly implied that they viewed openly or avowedly gay people differently from those who kept their orientation private, and reserved the right to treat them differently, contrary to the nondiscrimination requirement of Resolution 58,859. In the April 8 letter, the Sea Scouts, in effect, reserved the right to discriminate against avowedly gay or atheistic participants.

Healy v. James, *supra*, 408 U.S. 169, upon which plaintiffs rely, actually supports Berkeley's decision. While the high court there condemned government actions "denying rights and privileges solely because of a citizen's association with an unpopular organization" (*id.* at p. 186), the court went on to explain that the government could legitimately demand assurances that an individual or group would not engage in the same prohibited activities as the larger organization with which the individual or group was associated (*id.* at pp. 191-194). Specifically, the high court held that a local Students for a Democratic Society chapter's "equivocation" regarding the use of violent and disruptive tactics could warrant denying the group official recognition. (*Id.* at p. 191.) Though there was no evidence the local group actually posed a significant threat of disruption to the college (*id.* at pp. 189-190), the court explained, "the benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any campus rules with which it disagrees" (*id.* at pp. 193-194). The requirement that a student group seeking official recognition "affirm in advance its willingness to adhere to reasonable campus law . . . does not impose an

impermissible condition on the students' associational rights." (*Id.* at p. 193; see also *Grove City*, *supra*, 465 U.S. at p. 575 [requiring "Assurance of Compliance" from college was a "reasonable and unambiguous" condition of federal assistance].)

Similarly, Berkeley did not engage in overbroad or arbitrary regulation in denying a subsidy to a BSA program that refused to state an unambiguous local policy of nondiscrimination, instead pointedly reserving the right to discriminate against openly gay and atheistic participants. Denial of free berths to a program operating under a national organization with an enforced policy of discrimination, a program that was asked to and would not give an unqualified assurance of future nondiscrimination, was not overbroad or unjustified as a means of enforcing Berkeley's policy limiting free berths to nonprofit community service organizations that serve the public diversely and without invidious discrimination.

As explained earlier, a demurrer assumes the truth of the complaint's properly pleaded allegations, but not of mere contentions or assertions contradicted by judicially noticeable facts. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318; *Joslin v. H.A.S. Ins. Brokerage*, *supra*, 184 Cal.App.3d at p. 374.) Here, the noticeable and conceded facts contradict the complaint's assertions that Berkeley "decided to punish . . . [the] completely innocent" plaintiffs for their association with BSA despite knowing that plaintiffs had, in the April 8, 1998, letter, "agreed not to discriminate against gays or atheists." The facts, including those in the complaint, those subject to judicial notice, and those conceded by plaintiffs, show the Sea Scouts could not and did not unambiguously promise not to discriminate in the use of the marina facilities. The city council, in receipt of the city attorney's opinion discussing the April 8 letter's ambiguity and the city manager's consequent

denial recommendation, denied the continued subsidy because BSA's "discriminatory policies against gays and atheists" made impossible a full and unambiguous assurance the Sea Scouts would not discriminate in the future.

Similarly, plaintiffs' allegation that the city excluded plaintiffs from the free berth program without ever determining that the Sea Scouts themselves "pose[d] the threat" of discrimination and without "evidence that Plaintiffs or any participant in the Berkeley Sea Scouts program was going to unlawfully discriminate against anyone," is contradicted by their own concessions and the noticeable facts. The city asked for full assurances that the program posed no threat of future discrimination, but it did not receive them. In light of BSA's policies, which, as counsel conceded in this court, plaintiffs would have to follow, Berkeley reasonably concluded that the Sea Scouts' representations were inadequate to assure future compliance with the city's nondiscrimination rules. Plaintiffs' claim that Berkeley simply "refuses to take . . . yes for an answer" is belied by the record, which establishes that the Sea Scouts, because of BSA's enforced policies, could not and did not respond to the city with a simple "yes," but rather with an evasive "maybe."

Plaintiffs rely in part on allegations that individual members of the Berkeley City Council and other city officials expressed the intent to punish BSA or the Sea Scouts for BSA's policies.[10] Under some circumstances, where the decision

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[10] Councilmembers Woolley and Worthington allegedly "made clear," around the time of the March 11, 1998, Waterfront Commission meeting, that they intended to take "punitive actions" against the Sea Scouts in an "attempt to overturn [BSA's] national policies." At the May 5, 1998, city council meeting, unnamed Berkeley "officials" allegedly indicated the city should and would

(continued...)

maker's reason or object is itself a contested element of a claim of unconstitutionality, "statements made by members of the decisionmaking body" are properly considered, together with other types of evidence, in determining the object of the official action. (*Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) 508 U.S. 520, 540; see also *Arlington Heights v. Metropolitan Housing Corp.* (1977) 429 U.S. 252, 267-268.) But here there is no dispute the basis for the city council's action was, as the council minutes stated, BSA's "discriminatory policies against gays and atheists," which—as the record shows and plaintiffs' attorney conceded in this court—made it impossible for the Sea Scouts to give a complete and unambiguous guaranty against future discrimination. In light of that undisputed legislative object, allegations suggesting merely that individual council members voted for the action because of their personal hostility to BSA's views do not state a claim for a constitutional violation, for such individual motives do not alter the undisputed grounds upon which the council, as a body, acted. (See *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 572, fn. 5 ["'Material showing the motive or understanding of an individual legislator, including the bill's author, his or her staff, or other interested persons, is generally not considered. [Citations.] This is because such materials are generally not evidence of the Legislature's *collective* intent'"].)

CONCLUSION AND DISPOSITION

The properly pleaded factual allegations of the first amended complaint, taken as true and read in light of the

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[10] (...continued)
deny the Sea Scouts continued benefits in order to discourage BSA from maintaining its disfavored policies and to retaliate for BSA's expulsion of Timothy Curran (the plaintiff in *Curran v. Mount Diablo Council of the Boy Scouts*, *supra*, 17 Cal.4th 670) pursuant to those policies.

judicially noticeable facts and plaintiffs' factual concessions, show that Berkeley discontinued the Sea Scouts' berth subsidy because the program was unable, consistent with the enforced policies of BSA, to provide adequate assurances of future nondiscrimination. Denial of a continued subsidy on this ground did not infringe plaintiffs' associational, speech, or equal protection rights. We therefore affirm the judgment of the Court of Appeal.

WERDEGAR, J.

WE CONCUR:
GEORGE, C.J.
KENNARD, J.
BAXTER, J.
CHIN, J.
MORENO, J.
CORRIGAN, J.

Filed 11/25/02

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

EUGENE EVANS et al., Plaintiffs and Appellants, v. CITY OF BERKELEY et al., Defendants and Respondents.	A097187 (Alameda County Super. Ct. No. 809180-4)

Appellants challenge a judgment dismissing their action against respondent City of Berkeley. Appellants contend the trial court erroneously sustained a demurrer to their amended complaint, which challenged respondent's termination of a program under which appellants were allowed to berth their boats, rent free, at the Berkeley Marina. Appellants maintain the decision to end this subsidy of free rent for their boat berths violated their contractual rights, First Amendment rights, civil rights, and equal protection rights. We affirm the trial court's judgment.

Appendix B–2

I. FACTS AND PROCEDURAL HISTORY

Appellants identify themselves as members or affiliates of an unincorporated association of Sea Scouts, a group which is affiliated with the Boy Scouts of America. For many decades appellants had moored their boats, rent free, at the Berkeley Marina, which is owned by respondent City of Berkeley (Berkeley).

In 1997, Berkeley enacted a city policy, as stated in Berkeley City resolution No. 58,859-N.S., which forbids the use of city funds to subsidize the activities of private groups using city property at the marina, if those groups discriminate against individuals on grounds of race, sex, national origin, religion or lack thereof, sexual orientation, and other grounds.[1] In May of 1998, Berkeley informed appellants they could no longer berth their boats for free at the marina, unless they expressly abandoned any policy of discriminating against gays or atheists. Appellants declined to specifically comply with this requirement,[2] and their free rent subsidy was ended. However,

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[1] The resolution states, in pertinent part: "The Berkeley Marina advocates and practices equal opportunity in terms of access to its berthing facilities. Availability and use of the facilities will not be predicated on a person's race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability or medical condition." The Berkeley Municipal Code, section 13.28.060, also prevents Berkeley from discriminating based on sexual orientation in the provision of all city services.

[2] Appellants did agree to a modified version of a "don't ask, don't tell" program, in which appellants stated that they considered such matters as sexual orientation to be a private matter, which they would not ask anyone to divulge, and appellants agreed to obey any laws actually forbidding them from engaging in any illegal discrimination. Appellants also pointed out that some of their participants in the past

(continued...)

even in the absence of compliance with the nondiscrimination program, appellants were permitted to maintain their boats berthed at the marina, for a fee, as other members of the public are allowed to do. Appellants were required to pay an additional $433 per month to berth their large vessel, the Farallon, as they continued to do so.

Appellants, a group of individual Sea Scouts, brought this action alleging Berkeley had, inter alia, breached their contractual rights, and violated their First Amendment rights, civil rights, and equal protection rights.

Berkeley initially removed the action to federal court. However, United States District Judge Susan Illston ordered that the matter should be remanded to state court on procedural grounds, since one of the individual defendants who had been served was not joined in the removal petition.

Berkeley filed a demurrer to appellants' various causes of action in the Alameda Superior Court. The court construed Berkeley's demurrer as a motion for judgment on the pleadings, and granted it with leave to amend. Appellants filed an amended complaint, with almost identical claims.

Berkeley then filed a further demurrer, to all claims in the amended complaint. The trial court sustained Berkeley's demurrer without leave to amend, ruling that: (1) appellants

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[2] (...continued)
had been persons who were atheists or who had presumably not been heterosexuals, and appellants had not discriminated against those persons. However, appellants did not and could not agree not to discriminate on these grounds in the future, because the Boy Scouts of America would not allow appellants to agree to such conditions without losing their Boy Scout charter, and appellants had to obey because they were securing their marine insurance at favorable rates through the Boy Scouts of America.

had no valid contract with Berkeley requiring the city to abstain from charging appellants rent or enforcing its nondiscrimination policy; and (2) appellants were not deprived of their First Amendment rights, civil rights, or equal protection rights, and they were treated the same as any other group that discriminates. The trial court did not reach another issue, Berkeley's argument that appellants as individuals had no standing to assert the rights of the Berkeley Sea Scouts organization. A judgment of dismissal was entered, and appellants brought this appeal.

II. DISCUSSION

A. STANDARD OF REVIEW

Initially, the parties to this appeal dispute the proper standard of review. Berkeley suggests we may only reverse the judgment of dismissal if the trial court abused its discretion in denying leave to amend, while appellants argue we must exercise de novo review.

Appellants are correct on this issue. On appeal from a judgment of dismissal following an order sustaining a demurrer without leave to amend, we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal. 4th 412, 415 (*McCall*).) We assume the truth of all material facts properly pleaded, as well as facts that may be implied or inferred from those expressly alleged. (*Rose v. Royal Ins. Co.* (1991) 2 Cal. App. 4th 709, 716.)

B. THE TRIAL COURT'S RULING WAS CORRECT.

On de novo review, we conclude appellants have not pled legally valid claims for breach of contract or similar quasi-contractual claims such as estoppel. Nor have they stated

a cause of action based upon violations of their First Amendment rights, civil rights, or equal protection rights.

1. Contract Claims

Appellants, in their first three causes of action, attempt to assert claims for breach of a written contract and a covenant implied into such a contract (first cause of action); an oral contract (second cause of action); and estoppel (third cause of action). Appellants based these claims on prior resolutions of the city council dating from 1945 and 1969, which had favored the goals of scouting and the Sea Scouts. Those resolutions allowed the Sea Scouts organization to enjoy a waiver of fees for berthing boats, after the Boy Scouts of America granted Berkeley permission to use rocks from a Boy Scout camp to create fill at the marina during the late 1930's and early 1940's, in an informal accommodation referred to by appellants as the "rocks for docks" deal.

However, no lease or contract rights were granted by the resolutions, which provided at most only a permit, subject to Berkeley's rules and regulations and also subject to cancellation on 30 days' notice. The first, 1945 resolution, No. 27,738, reads in pertinent part: "WHEREAS, the Boy Scouts of America have filed a request for the use without charge of one open berth and mooring facilities for seven boats in the Berkeley Yacht Harbor; . . . [¶] . . . [¶] NOW, THEREFORE, Be it Resolved that the Boy Scouts of America are hereby granted the use without charge of one berth and mooring facilities for seven boats to be designated by the Harbormaster. [¶] RESOLVED FURTHER, that said berth and mooring facilities shall be used by the Boy Scouts of America in accordance with all rules and regulations established by the City of Berkeley relative to the Berkeley Yacht Harbor, and said permission herein granted is subject to revocation by a 30 day written notice." Similarly, the second, 1969 resolution,

No. 42,885 provided a permit for six berths, two dry storage spaces, and one dock locker, without charge, but also stated: "The City of Berkeley reserves the right to revoke this permit at any time upon thirty (30) days written notice . . . ."

Significantly, appellants' "contract" claims do not arise from any explicit contractual language made enforceable under the Berkeley city charter, but arise from the language of the two resolutions of the city council, which could be changed, modified, or limited prospectively in the future, as Berkeley has done. In fact, the resolutions appellants rely on specifically state that the program allowing free rent for boat berths was subject to all rules and regulations regarding marina facilities, and could be terminated at any time, on 30 days' notice. Appellants do not contend they were not given 30 days' notice of the requirement to pay rent in the future, and the purported "contract" created by the resolutions contained no substantive terms which would establish Berkeley breached such a "contract." Berkeley's demurrer to such claims was therefore properly sustained. (See *McCall, supra*, 25 Cal. 4th at p. 415.)

Appellants' contract or quasi contract claims are also infirm on another closely related ground. There was no contract complying with the formal requirements of section 65 of the Berkeley city charter.[3] To create an enforceable contract with Berkeley, the city charter requires authorized execution by a city officer and approval by countersignature of the city auditor. This requirement was not met. (See *San Francisco Internat. Yachting etc. Group v. City and County of San Francisco*

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[3] Section 65 of the Berkeley city charter provides: "All contracts shall be drawn under the supervision of the City Attorney. All contracts must be in writing, executed in the name of the City of Berkeley by an officer or officers authorized to sign the same, and must be countersigned by the Auditor, who shall number and register the same in a book kept for that purpose."

(1992) 9 Cal. App. 4th 672, 683-684 [Per Haning, J., in the absence of a signed contract complying with the formal requirements of a city charter, no binding contract existed; the demurrer was properly sustained.] (*San Francisco Internat. Yachting*).) Neither of the two resolutions was ever approved as a binding contract by the authorized signature of an officer and the city auditor, as the Berkeley city charter requires, and the very language of the resolutions shows that the city council did not intend to create contractual rights enforceable in perpetuity. (See *ibid.*)[4]

For similar reasons, the trial court sustained the demurrer to the appellants' third cause of action for "estoppel." Such an estoppel cannot arise when the formal requirements for a city contract specified in a municipal charter are not met. (See *San Francisco Internat. Yachting, supra*, 9 Cal. App. 4th at pp. 683-684.) We distinguish in this regard the case of *Berkeley Lawn Bowling Club v. City of Berkeley* (1974) 42 Cal. App. 3d 280, 285-289 (*Berkeley Lawn Bowling*), relied on by appellants. There, the court was called upon to interpret a series of *written* leases and other *written* agreements between Berkeley and a private group of lawn bowling enthusiasts. Questions surrounding the lack of a written agreement authorized under the Berkeley city charter were simply never addressed.

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[4] Appellants concede the resolutions were not approved and signed by the city auditor, as would be required for a contract binding on Berkeley under its charter, although appellants suggest we should find there was substantial compliance with other legal requirements. However, the fact remains the necessary formal requirements were not met, probably because no one at the time believed these resolutions created any contract rights. That assumption was correct, and the resolutions do not have any contractual terms which Berkeley breached, even if the other legal requirements for an enforceable contract had been met, which they were not. (See *San Francisco Internat. Yachting, supra*, 9 Cal. App. 4th at pp. 683-684.)

In addition, we find that appellants did not plead the requirements for such an estoppel, as the trial court pointed out. (Cf. *Berkeley Lawn Bowling, supra*, 42 Cal. App. 3d at pp. 285-289 [Lawn bowlers had detrimentally relied on written agreements with Berkeley concerning construction of a club house next to city-maintained bowling greens.] Although appellants had received more than 50 years of rent-free boat berthing, they could not plead detrimental reliance since the Berkeley resolutions providing this free rent arrangement were not formal written contracts and could be terminated at any time on 30 days' notice, could always be altered, or could be limited by subsequent resolutions or other legislation. (Cf. *ibid.*)

We therefore agree that appellants presented no valid claim of breach of any contractual rights or estoppel, nor could they amend their complaint to do so. The trial court properly sustained the demurrer to these causes of action. (See *McCall, supra*, 25 Cal. 4th at p. 415.)

2. Appellants Were Not Deprived of Their First Amendment Rights.

Appellants, joined by the amici Pacific Legal Foundation and Pacific Justice Institute, who have filed amicus briefs with our permission, next maintain that their free speech and free association rights were violated by the decision of Berkeley to end the city subsidy of free rent for appellants' boat berths. This argument is also unconvincing.

In the fourth cause of action of the amended complaint, appellants allege Berkeley violated their civil rights under the state Unruh Civil Rights Act, Civil Code section 51 et seq., by infringing their right to free speech, free association, and equal protection. In the fifth and final cause of action, appellants also assert similar claims of deprivation of their First Amendment

and other constitutional rights, under the provisions of 42 United States Code section 1983.[5]

Appellants did not and could not plead a cause of action based upon the deprivation of their First Amendment rights. They were treated the same as any other private citizens or groups who desire to rent berths at the marina, and must pay a rental fee. Appellants did not qualify for a city subsidy, free rent, which is made available to some nonprofit, nondiscriminating groups, because they declined to adhere to Berkeley's nondiscrimination policy. Appellants thus remained free to exercise their First Amendment rights, and berth their boats at the marina, albeit without a city subsidy. Berkeley's actions have not required appellants to stop discriminating in these regards, which they remain free to do.

The present case therefore does not involve an order to cease discrimination; nor does it involve a denial of access to a public forum, or public employment, public benefits provided to all citizens by law, or public property, based upon the content of speech or a particular desire to associate, as in the cases cited by appellants and amici. (Cf. *Boy Scouts of America v. Dale* (2000) 530 U.S. 640, 659 [Boy Scouts were improperly *ordered* to cease discriminating under state law.] (*Boy Scouts of America*); *Lamb's Chapel v. Center Moriches Union Free School Dist.* (1993) 508 U.S. 384, 394-397 [Religious group could not be forbidden to show a certain film on public property, merely because the film had a religious viewpoint]; *Rosenberger v. Rector and Visitors of the Univ. of VA* (1995) 515 U.S. 819, 837 [Public university could not deny access to university funding for a religious organization's newspaper based on its viewpoint, while granting such funding to all other

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[5] 42 United States Code section 1983 provides, in pertinent part, that any persons deprived of their constitutional rights "under color of" any state statute or ordinance may bring suit for redress.

viewpoints.]; *Perry v. Sindermann* (1972) 408 U.S. 593, 596-597 [Public employment could not be denied to a particular person, based upon his speech or political views.]; *Sherbert v. Verner* (1963) 374 U.S. 398, 404-405 [Public unemployment benefits made available to all qualifying employees could not be denied based upon an applicant's religious views.]; *Torcaso v. Watkins* (1961) 367 U.S. 488, 495-496 [Public employment could not be reserved for those willing to sign a declaration that they believed in God.]; *Speiser v. Randall* (1958) 357 U.S. 513, 529 [California could not require a taxpayer's signature on a loyalty oath as part of a tax filing.].) The rationale of these cited cases, with which we concur, is that the state may not order, forbid, or require a particular type of political or religious speech or association in order to favor or disfavor a particular viewpoint.

However, Berkeley has not attempted to muzzle anyone's speech, and Berkeley has not ordered appellants to cease discriminating or associating as they please. Berkeley has only prevented appellants from enjoying a certain city subsidy, free rent, unless appellants' program is open to all residents without regard to the barriers created by the types of invidious discrimination Berkeley seeks to discourage. The federal Supreme Court and the California Supreme Court have held and indicated that the use of such a criterion of nondiscrimination for a public subsidy, intended for private nonprofit organizations open to all persons, would not violate the free speech rights of private discriminating organizations not qualifying for the subsidy. (*Grove City College v. Bell* (1984) 465 U.S. 555, 575-576 [A subsidy conditioned on compliance with antidiscrimination goals did not violate the First Amendment rights of a noncomplying college.] (*Grove City*); accord, *Bob Jones University v. United States* (1983) 461 U.S. 574, 602-604 [Government may condition a subsidy created by tax exempt status on a lack of illegal discrimination by nonprofit organizations.] (*Bob Jones*); *Regan v. Taxation With*

Representation of Wash. (1983) 461 U.S. 540, 549 [Subsidy under tax laws for nonprofit organizations could be conditioned upon limitations on their exercise of their First Amendment rights.] (*Regan*); *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal. 4th 670, 701 [Tax exempt subsidy status could be removed from the Boy Scouts, if they engaged in forbidden discrimination.] (*Curran*).)

Thus, it has uniformly and repeatedly been held permissible to condition a public subsidy on compliance with nondiscrimination policies. For example, *Grove City, supra*, dealt with a public subsidy provided to certain colleges to defray or supplement the tuition paid by students. The subsidy was conditioned on compliance with an antidiscrimination policy, requiring the colleges to agree not to discriminate against students based on protected status, including sex. One college and its students argued that this condition or restriction on the subsidy violated the First Amendment rights of the college and its students, including their right of association. The federal Supreme Court unanimously rejected this argument: "Requiring Grove City to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the [subsidy] program infringes no First Amendment rights of the College or its students." (*Grove City, supra*, 465 U.S. at pp. 575-576.) Similarly, in our case, a nondiscrimination condition on the public subsidy of free boat berths does not violate the First Amendment rights of appellants.

In *Bob Jones, supra*, 461 U.S. at pages 603-604, the federal Supreme Court dealt with a nondiscrimination condition which had been attached to the federal tax law requirement of charitable status, allowing favorable tax treatment of nonprofit foundations. A university contended its First Amendment right to freedom of religion had been violated by this condition, requiring it to cease discriminating in order to receive the

subsidy of favorable tax status. The federal Supreme Court rejected this argument, observing that denial of a tax subsidy did not violate any First Amendment rights, because the university remained free to observe its own religious principles in favor of discrimination, albeit without a subsidy: "Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets." (*Ibid.*) Likewise, in the present case Berkeley has not prevented appellants from associating as they please; it has simply prevented them from collecting a subsidy, unless they agree not to discriminate.

Similarly, in *Regan, supra*, 461 U.S. at page 549, a subsidy under certain federal tax laws was made available to nonprofit organizations, but only on the condition that they not exercise their First Amendment rights in certain ways. The high court ruled, (per Rehnquist, J.) that even though the right in question was protected by the First Amendment, this public subsidy could validly be conditioned upon an agreement by the recipient organizations that they would not exercise these First Amendment rights, because the mere "decision not to subsidize the exercise of a fundamental right does not infringe the right . . . ."

More recently, the California Supreme Court ruled, in *Curran, supra*, 17 Cal. 4th at page 701, that the Boy Scouts of America was not a "business establishment" of the type that could be ordered not to discriminate under California's Unruh Civil Rights Act; however, the high court also indicated a subsidy, such as tax exempt status could be removed from the Boy Scouts, if they engaged in forbidden discrimination. "To begin with, even though the provisions of the Unruh Civil Rights Act do not apply to the membership policies of the Boy Scouts, it does not follow, as the trial court assumed, that the Boy Scouts are therefore free to exclude boys from membership

on the basis of race, or on other constitutionally suspect grounds, with impunity. The Unruh Civil Rights Act is not the only legislative measure that is aimed at curbing discrimination on the basis of race, and in other contexts courts have upheld the imposition of a variety of sanctions—including the denial of tax-exempt status—upon an otherwise qualified nonprofit entity that engages in racial discrimination. (See, e.g., *Bob Jones University v. United States* (1983) 461 U.S. 574 . . . .)" (*Curran, supra*, at p. 701.) Similarly, Berkeley has not ordered or required appellants or the Boy Scouts to cease discriminating, but instead conditioned a city subsidy on compliance with nondiscrimination principles.

The case law from higher courts uniformly supports Berkeley's conditioning of a subsidy upon adherence to such nondiscrimination principles.[6] We are bound by these rulings

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[6] For an interesting examination in greater depth of the possible constitutional problems created by governmental subsidies and the restrictions which may be placed on them, see the extensive discussion by Professor (now Dean) Kathleen M. Sullivan in *Unconstitutional Conditions* (1989) 102 Harv. L. Rev. 1415, 1499-1506. Among the questions raised by this article is the following: Why is it that governments may use conditions on subsidies, but not direct orders, to favor certain types of political goals affecting rights of free speech and association? Logically, perhaps, it is difficult to justify the existing distinction in the case law between the two types of governmental action. The full ramifications of this constitutional question may raise difficult theoretical issues which are beyond the scope of the present appeal, but no court has ever held governments may not provide or condition subsidies to favor groups adhering to genuine nondiscrimination goals, and the existing case law, cited in the text above, uniformly favors the constitutionality of similar restrictions on governmental subsidies. The reason for the distinction in the case law may lie only in the pragmatic observation that it is one thing to offer a subsidy to encourage a boat captain to take on passengers or crew, and quite

(continued...)

and follow them. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455.) The trial court properly sustained respondent's demurrers to these First Amendment claims. (*See McCall, supra*, 25 Cal. 4th at p. 415.)

3. Other Issues

Appellants maintain their partial willingness to comply with the city's nondiscrimination policy, through a form of "don't ask, don't tell" compromise, should have been enough to establish compliance with the Berkeley nondiscrimination policy, and they contend their rights were violated by Berkeley's insistence on more stringent nondiscriminatory language. However, the requirement that appellants explicitly agree to comply with Berkeley city policy, by specifically agreeing not to discriminate against those persons of whose sexual orientation appellants become aware, did not violate appellants' First Amendment rights, since it was merely a permissible and reasonable condition placed upon receipt of a public subsidy. (See *Grove City, supra*, 465 U.S. at pp. 575-576.)

Appellants also suggest they are being penalized for exercising their First Amendment rights in deciding to associate with certain persons or groups, including the national Boy Scouts of America organization, and appellants contend they are being punished for declining to protest against the discriminatory policies of the national scouting organization.

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[6] (...continued)
another thing to order him to do so. Of course, public subsidies are usually granted in order to further some public purposes, and it would be a surprising result if subsidies were required to be paid to those who would not agree to comply with conditions designed to further those purposes. (See *Grove City, supra*, 465 U.S. at pp. 575-576.)

However, Berkeley never required appellants to cease associating, engage in protest or speech, or do anything in those respects in order to receive a subsidy. The only thing appellants had to do to receive a subsidy was to agree to comply in the future with Berkeley's nondiscrimination policy. Appellants did not agree, apparently because the national scouting organization was providing low cost marine insurance, and would not permit appellants to so agree. This does not show any violation of appellants' First Amendment rights by Berkeley, which could require compliance with antidiscrimination policies from those receiving a city subsidy. (See *Grove City, supra*, 465 U.S. at pp. 575-576.)

Further, there is no merit to appellants' related claims that their civil rights or equal protection rights were violated. Appellants were not denied any of the rights enjoyed by other citizens, i.e., the right of free speech and association, the right to due process, or even the specific right to use the marina, for a regular fee. Appellants were treated the same as other private parties who receive no rent subsidy from the city, and who need not agree to comply with the Berkeley policy against discrimination.

Although other nonprofit groups may qualify for a subsidy, should they comply with Berkeley City resolution No. 58,859-N.S., this does not demonstrate a denial of equal protection as to appellants, because they are not similarly situated. (See *Maher v. Roe* (1977) 432 U.S. 464, 470-477 [state's decision to fund pregnancy-related medical expenses, but not abortions, did not violate the equal protection rights of those who did not qualify for a subsidy because they desired to exercise their protected right to end their pregnancies.].) Appellants had not agreed to comply with the Berkeley nondiscrimination policy, so they were obviously not similarly situated with those other organizations who agreed to comply. (See *ibid.*; *Grove City*, *supra*, 465 U.S. at pp. 575-576.)

Finally, appellants insist they had First Amendment rights to associate or speak with whomever they pleased, and they claim Berkeley has penalized those rights, by removing the subsidy of free rent for their boat berths. It is true that appellants' decision not to comply with Berkeley's antidiscrimination conditions would arguably be protected in other contexts by the First Amendment. (See *Boy Scouts of America, supra*, 530 U.S. at p. 659 [state could not simply order an end to certain types of discrimination]; *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995) 515 U.S. 557, 567-581 [state could not order organizations to include other groups in a parade].) However, this does not mean Berkeley would be required by equal protection or First Amendment principles to automatically grant appellants the public subsidy of free rent on boat berths, which was intended for those who agree to comply with the nondiscrimination conditions placed on this public subsidy. (See *Grove City, supra*, 465 U.S. at pp. 575-576; *Regan, supra*, 461 U.S. at p. 549.)

The trial court's judgment of dismissal, following its ruling sustaining the demurrer, is affirmed as to all of appellants' claims. (See *McCall, supra*, 25 Cal. 4th at p. 415.)[7]

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[7] In light of these conclusions, rejecting appellants' claims on the merits, we need not reach the additional issue of whether the individual appellants had standing to pursue all of their contractual claims and other related claims. The trial court did not reach this issue, finding it moot. (*Finnie v. Town of Tiburon* (1988) 199 Cal. App. 3d 1, 10.)

III. DISPOSITION

The judgment of dismissal is affirmed.

STEVENS, J.

We concur.

JONES, P.J.

GEMELLO, J.

(A097187)

Appendix C–1

Filed 11/06/01

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

EUGENE EVANS, et al., Plaintiffs, v. CITY OF BERKELEY, et al., Defendants.	No. 809180-4 ORDER SUSTAINING DEMURRERS TO FIRST AMENDED COMPLAINT WITHOUT LEAVE TO AMEND Date: October 9, 2001 Time: 2:00 p.m. Dept.: 31 (Hon. James A. Richman)

The General Demurrers to the First Amended Complaint and to each cause of action in that Complaint filed on behalf of Defendants City of Berkeley, City Council of the City of Berkeley, and City of Berkeley Waterfront Commission (hereafter, when referred to collectively, "Defendants") came on regularly for hearing on October 9, 2001, in Department 31 of the above-entitled Court, the Honorable James A. Richman presiding. Assistant City Attorney Laura McKinney appeared on behalf of Defendants. Jonathan Gordon appeared on behalf of Plaintiffs.

After full consideration of the Demurrers, the briefs in support and in opposition thereto, the authorities cited by the parties, the documentary evidence for which Respondents requested judicial notice, and the oral arguments presented at the hearing, and the matter having been submitted for decision, and good cause appearing, IT IS HEREBY ORDERED AS FOLLOWS:

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1. The Demurrers to the First Cause of Action for Breach of Contract in Writing/Implied Covenant of Quiet Enjoyment, the Second Cause of Action for Breach of Oral/Implied Contract, and the Third Cause of Action for Estoppel are sustained without leave to amend. The municipal charter of the City of Berkeley requires that all contracts with the City shall be in writing and be executed by an officer authorized to sign on behalf of the City. (Berkeley Municipal Charter Section 65.) The Resolutions upon which Plaintiffs rely do not satisfy the requirements of Charter Section 65 (see First Amended Complaint at ¶¶ 19-23; and Exhibits C and D thereto) and, thus, Plaintiffs cannot state a cause of action for breach of written contract. (See *Dynamic Industries Co. v. City of Long Beach* (1958) 159 Cal. App. 2d 294, 298-299 ["when a municipal charter contains an express limitation upon the mode in which the city may contract, the city is bound only by contracts executed in accordance with the charter provisions. . . ."].) Similarly, because the Charter requires that agreements with the City be in writing, Plaintiffs cannot state a cause of action for breach of oral/implied contract. Last, the law is clear that "when there has been no compliance with the relevant charter provision, the city may not be liable in quasi-contract and will not be estopped to deny the validity of the contract." (*San Francisco International Yachting v. City and County of San Francisco* (1992) 9 Cal. App. 4th 672, 683.) Accordingly, Plaintiffs cannot state a cause of action for estoppel as against these demurring Defendants.

2. The Demurrers to the Fourth Cause of Action for Violations of the Unruh Act and Berkeley Municipal Code/Resolution, and the Fifth Cause of Action for Violation of Constitutional Rights, Civil Code § 52.1, and Deprivation of Rights under Color of State Law, 42 U.S.C. §§ 1983, 1988, are sustained without leave to amend. Our nation's courts have held that public entities may condition public subsidies, such as free berthing space at a City-owned marina, upon the recipient's

compliance with state and local laws that prohibit discriminatory membership policies without violating First Amendment, Equal Protection, or Unruh Act principles. (See, e.g., *Bob Jones University v. United States* (1983) 461 U.S. 574, 595, 604; *Curran v. Mount Diablo Silverado Council* (1998) 17 Cal. 4th 670, 675, 701.) In addition to these bases, Plaintiffs' equal protection claim fails on the separate ground that Plaintiffs are not "similarly situated" to the other non-profit groups described in Plaintiffs' First Amended Complaint, all of which differ from Plaintiffs in that these groups maintain membership policies that are consistent with the City's non-discrimination policy. (See FAC ¶ 114.E; and Exhibits F through H to Defendants' Request for Judicial Notice filed April 2, 2001.)

3. In light of the foregoing rulings sustaining the Demurrers to each cause of action of the First Amended Complaint, the Court does not reach the issue of whether the individual Plaintiffs identified in the Complaint have standing to sue to enforce any rights as may be claimed or asserted by the separate and distinct association generally known as the Berkeley Sea Scouts.

4. The entire action is dismissed with prejudice, as against these demurring Defendants. Defendants to file and serve a proposed form of judgment by November 29, 2001.

IT IS SO ORDERED.

Dated: November 2, 2001

/s/ James A. Richman
James A. Richman
Judge of the Superior Court

Appendix C–4

Filed Jan. 8, 2002

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CITY OF BERKELEY

SUPERIOR COURTS OF ALAMEDA COUNTY

STATE OF CALIFORNIA

EUGENE EVANS, et al., Plaintiffs, v. CITY OF BERKELEY, et al. Defendant.	NO. 809180-4 **JUDGMENT**

The Court having sustained Defendants' Demurrers to Plaintiffs' First Amended Complaint without leave to amend and there being no further matters at issue in the case, accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that the entire action is DISMISSED WITH PREJUDICE.

Dated: JAN - 8 2002

By: /s/ James A. Richman
The Honorable James A. Richman
Judge of the Superior Court

Received Nov. 19, 2001

Appendix D–1

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Attorney for Plaintiffs

Filed 07/17/01

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA, NORTHERN DIVISION

EUGENE EVANS, BRUCE CARNES, AMANTUCK CAPPA-LAMBERT, RIMMON SCHURIK, ERIC DAVID, NATHANIEL BROWNLOW, MARIO LOPEZ, ANDERS NELSON, KEITH DEIRUP, JING ZHANG, TLACAELEL ALVAREZ TONATIUH ALVAREZ, JOSEPH FISHER, JAY UPPAL, as individual plaintiffs, and on behalf of all BERKELEY SEA SCOUT program participants, Plaintiffs, v. CITY OF BERKELEY, CITY OF BERKELEY-CITY COUNCIL, CITY OF BERKELEY-WATERFRONT COMMISSION and DOES 1 to 20, inclusive, Defendants.	Case No. 809180-4 **FIRST AMENDED COMPLAINT** Breach of Contract, Breach of Implied Covenant of Quiet Enjoyment, Implied Covenant of Good Faith and Fair Dealing; Breach of Oral Contract/ Implied Contract; Estoppel; Violations of Unruh Act and Berkeley Municipal Code/Resolution; Violation of Constitutional Rights: Deprivation of Rights Under Color of State Law

Appendix D–2

Plaintiffs EUGENE EVANS, BRUCE CARNES, AMANTUCK CAPPA-LAMBERT, RIMMON SCHURIK, ERIC DAVID, NATHANIEL BROWNLOW, MARIO LOPEZ, ANDERS NELSON, KEITH DEIRUP, JING ZHANG, TLACAELEL ALVAREZ, TONATIUH ALVAREZ, JOSEPH FISHER, and JAY UPPAL, as individual plaintiffs, and on behalf of all of the BERKELEY SEA SCOUT program participants, (all of the plaintiffs set forth in this paragraph are hereinafter collectively referred to as "Plaintiffs.") hereby allege as follows:

PRELIMINARY STATEMENT:

1. Plaintiffs EUGENE EVANS, BRUCE CARNES, AMANTUCK CAPPA-LAMBERT, RIMMON SCHURIK, NATHANIEL BROWNLOW, MARIO LOPEZ, KEITH DEIRUP, JING ZHANG, TLACAELEL ALVAREZ, TONATIUH ALVAREZ, JOSEPH FISHER, and JAY UPPAL, are and at all times herein mentioned were, residents of the County of Alameda. Plaintiffs ERIC DAVID and ANDERS NELSON, are and at all times herein mentioned were, residents of the County of Contra Costa.

2. Defendant CITY OF BERKELEY is, and at all times herein mentioned was, a municipal corporation organized and existing under and by virtue of the laws of the State of California, located in the County of Alameda.

3. Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL and CITY OF BERKELEY WATERFRONT COMMISSION are, and at all times herein mentioned were, political subdivisions of the City of Berkeley and/or the State of California, created and existing under and by virtue of the laws of the State of California, located in the County of Alameda.

4. Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL, CITY OF BERKELEY WATERFRONT COMMISSION, and DOES 1 to 20, inclusive, are hereinafter referred to collectively as "Defendants."

5. On November 21, 1998, Plaintiffs served Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL, and CITY OF BERKELEY WATERFRONT COMMISSION by mail, with claims for, inter alia, breaches of contract/covenants, the interference with constitutional/statutory rights, injuries, losses and damages suffered and incurred by Plaintiffs caused by the events and occurrences herein mentioned, in compliance with the requirements of the Government Code. Copies of the claims are attached hereto collectively as **Exhibit A** and incorporated by this reference: One complete claim form together with the face sheets of the other identically worded plaintiffs' claims are attached.

6. On or about January 19, 1999, Plaintiffs' claims were denied in full by defendant CITY OF BERKELEY. Copies of the notices of denial of the claims are attached hereto collectively as **Exhibit B** and incorporated by this reference.

7. The true names or capacities, whether individual, corporate, public entity, associate, or otherwise, of defendants named herein as DOE 1 through DOE 20, inclusive, are unknown to Plaintiffs, who therefore sues these defendants by such fictitious names, and Plaintiffs will amend this complaint to show their true names and capacities when the same have been ascertained; Plaintiffs are informed and believe, and on that basis allege, that each of the fictitiously named defendants designated DOE 1 through DOE 20, herein is negligently, legally, willfully or intentionally responsible for the breaches, for interference with Plaintiffs' civil/constitutional/statutory/legal rights, events and happenings herein referred to, and negligently, legally, by way of breach of

contract, willfully or intentionally caused injury and damages proximately thereby to Plaintiffs as herein alleged.

8. The agreements (oral/written/implied contract/estoppel/lease) herein alleged were entered into in the City of Berkeley, County of Alameda, State of California. The performance of the agreements oral/written/implied contract/estoppel/lease) herein alleged was to take place in the City of Berkeley, County of Alameda, State of California. The injuries to Plaintiffs herein alleged occurred in the City of Berkeley, County of Alameda, State of California.

9. Plaintiffs are informed and believe, and on that basis allege, that at the time of the events and occurrences herein mentioned, defendants, and each of them, were the agents, servants, officers and/or employees of the other remaining defendants and at all times herein mentioned were acting within the scope and course of such agency, service, authority, employment or ratification.

10. Plaintiffs and the Boy Scouts of America have fully performed all conditions, covenants, and promises required of them under the agreements (oral/written/implied contract/estoppel/lease).

11. At all times mentioned herein the BERKELEY SEA SCOUTS program has had no formal organizational administration. The BERKELEY SEA SCOUTS simply meet and have met informally on a weekly basis in a meeting room at a local church in the City of Berkeley. Anyone is and was permitted to attend the meetings and have their opinions heard at such meetings. Any action to be taken by the BERKELEY SEA SCOUTS generally was and is done by way of consensus opinion and is discussed by persons attending the meetings. Persons attending the meetings refer to themselves as Committee Members. Commonly, adult volunteers (many of

whom were formerly Berkeley Sea Scouts themselves), parents of Sea Scouts and the Skippers of the Sea Scouts ships attend the meetings and direct the actions of the BERKELEY SEA SCOUTS.

The BERKELEY SEA SCOUTS program is and at all times mentioned herein was an unfunded program. There is no budget. The BERKELEY SEA SCOUTS program traditionally has relied upon the Skippers and former members generosity to provide out of their own pockets needed goods, supplies, fuel, and services for continued operations. Although the Berkeley Sea Scouts program is associated/affiliated with the Boy Scouts of America, it receives no direct funding from the Boy Scouts of America. The cost of membership in the Berkeley Sea Scout program has been only seven dollars ($7) per year to the youth participant. However, some youth-participants are unable to afford to pay even that much. Many participants in the Berkeley Sea Scout program are economically disadvantaged youths.

The BERKELEY SEA SCOUT program has no full time or part time employees. None of the BERKELEY SEA SCOUT program participants is paid for their time. The BERKELEY SEA SCOUTS program is, and at all times mentioned herein was, made up of adult community volunteers who volunteer their time and skills to teach boys and girls ages 13 to 18 a variety of valuable vocational skills for youths including, without limitation, pipe-fitting, marine engine repair, electrical repair, wood working, large boat handling, small boat handling, navigation, rescue operations, sailing, carpentry, painting, sewing, metal working, fiber glassing, working together as a part of a team with other shipmates, and generally helping to develop skills for a future in a maritime career.

The BERKELEY SEA SCOUTS have included a variety of different "ships" since 1936. At all times mentioned herein

the BERKELEY SEA SCOUTS was made up collectively of two "ships" the Northland, Ship # 52 and the Farallon, Ship # 44. Each "ship" is the functional equivalent of a boy scout "troop" and may include more than one vessel, ship or boat. Peter Saugman at all times mentioned herein was the Skipper of the Northland, Ship # 52. Mr. Saugman is now deceased.

Plaintiff EUGENE EVANS at all times mentioned herein was and is the Skipper of the Farallon, Ship # 44. Plaintiff EUGENE EVANS has been a Sea Scout Skipper for over 27 years. Plaintiff EUGENE EVANS has been a Berkeley Sea Scout program participant ever since his youth in 1957 when he was just 13 years old. Plaintiff EUGENE EVANS is, and at all times mentioned herein was a practicing California credentialed teacher. Plaintiff EUGENE EVANS is the most senior of all of the Berkeley Sea Scout program participants still actively engaged in the program.

Each of the Plaintiffs has suffered injuries as a result of the actions of Defendants. These injuries include, inter alia, the unlawful discrimination against them by the Defendants including interference with and attempted interference with their First Amendment rights of freedom of association and freedom of speech, the threatened loss of the Northland ship to the Boy Scouts of America if plaintiffs complied with the demands of Defendants, loss of membership in the BERKELEY SEA SCOUTS due to an inability to pay the $7 membership fee formerly paid by the Skipper EUGENE EVANS who now pays over $500 per month in berth fees, a disintegration of the community outreach program due to a lack of funds, a general disintegration and scaling back of the program due to a lack of funds, a loss of formerly free services and events (such as cruises, meals, beverages and overnight camping trips) formerly paid for by the Skipper EUGENE EVANS who can no longer afford them, a diminished use of the Farallon ship for cruises due to a lack of funds, the threatened

loss of maritime liability insurance made available at a greatly reduced rate from the Boy Scouts of America if plaintiff's complied with the demands of Defendants, and the continuing loss each month for berth fees of over $500 per month at this time.

The Plaintiffs, including plaintiff EUGENE EVANS, at all times mentioned herein were all BERKELEY SEA SCOUTS program participants known as the BERKELEY SEA SCOUTS and were duly authorized to bring this action on behalf of themselves and in a representative capacity on behalf of the other BERKELEY SEA SCOUTS program participants, past and future. Plaintiffs have standing to bring this action on behalf of themselves as individuals and as the BERKELEY SEA SCOUTS: See **CODE OF CIVIL PROCEDURE** sections 369.5 and 382; **Tenants Association of Park Santa Anita v. Southers** (1990) 222 Cal. App. 3d 1293, 1299-1304; **Residents of Beverly Glen, Inc. v. City of Los Angeles** (1973) 34 Cal. App. 3d 117, 127, 128; **Stocks v. City of Irvine** (1981) 114 Cal. App. 3d 520, 532; **Raven's Cove Townhomes, Inc. v. Knuppe Development Co.** (1981) 114 Cal. App. 3d 783, 793-795.

12. The factual allegations, interests and legal issues averred in the following paragraphs of this Complaint are common to all of the above individually named Plaintiffs (who are all BERKELEY SEA SCOUT program participants) as well as the unnamed participants of the Berkeley Sea Scout program on whose behalf the individual plaintiffs also sue. Proceeding via this representative action for participants of the Berkeley Sea Scout program provides substantial benefits for the Court as well as the litigants. Considerations of necessity, convenience, expedience, judicial economy and justice warrant proceeding via this representative procedure. The participants of the Berkeley Sea Scout program will be adequately represented and their interests protected via this representative

action. The interests of the participants of the Berkeley Sea Scout program are identical to the individual plaintiffs named herein who are comprised of a representative sampling of adult volunteers and youths who participate in the Berkeley Sea Scouts program.

The parameters of the Berkeley Sea Scouts represented in this action are as follows: Those Berkeley Sea Scout youths and adult volunteers who were involved with the Berkeley Sea Scouts program conducted on the Farallon, Ship #44 or the Northland, Ship #52 at any time from February 1, 1998, through November 21, 1998. Individual losses of many Berkeley Sea Scouts program participants do not appear to be great enough to warrant separate actions. The Berkeley Sea Scout program participants are an ascertainable class and they share a well-defined community of interest among their members. The Berkeley Sea Scout program participants number approximately 150 persons and it is impracticable to bring them all before the Court. Thus, the above-named Plaintiffs (who are all Berkeley Sea Scout program participants) sue individually as well as for the benefit of all Berkeley Sea Scout program participants on the interests and issues alleged in this Complaint that are common to them all.

13. In or around 1936 or 1937 the Mount Diablo Council of the Boy Scouts of America ("Boy Scouts") reached an agreement (oral/implied contract/estoppel) with the City of Berkeley, whereby the Boy Scouts permitted the City of Berkeley to quarry and remove 40,000 tons of rock and fill from the hills of Camp Berkeley (owned by the Boy Scouts of America) during the year 1937 for use in the construction of the Berkeley Marina and the sea wall breakwater for the Berkeley Marina which was being constructed during that time. In exchange, the City of Berkeley was to provide permanent free mooring and berthing rights for the boats/ships of the Berkeley Sea Scouts in the Berkeley Yacht Harbor/Marina.

14. The agreement (oral/implied contract/estoppel) with the City of Berkeley was made for the express benefit of the Berkeley Sea Scouts and adult volunteers then participating in the Berkeley Sea Scouts program, as well as for the benefit of all future Berkeley Sea Scouts and all adult volunteers who would participate in the Berkeley Sea Scouts program in the future. Each of the Plaintiffs at all times mentioned herein was either a Berkeley Sea Scout or adult volunteer participating in the Berkeley Sea Scouts program, and was a participant in the Berkeley Sea Scouts program since at least January of 1998. Each of the Plaintiffs is also an aggrieved party for the purpose of asserting all applicable constitutional, statutory and common law rights and remedies mentioned in this action.

15. The rock and fill which the Boys Scouts permitted to be removed from Camp Berkeley pursuant to the agreement (oral/implied contract/estoppel) was worth approximately $0.25-$0.50 per ton in 1937. At that price, the 40,000 tons of rock and fill provided by the Boy Scouts on behalf of the Sea Scouts to the City of Berkeley would have cost between ten and twenty thousand dollars ($10,000-$20,000) in 1937. In 1937, berth rental at the Marina for boats over 35 feet was only five dollars ($5) per month.

16. In furtherance of that agreement (oral/implied contract/estoppel) with the City of Berkeley, the Boy Scouts continued to permit the City of Berkeley without any charge to remove an additional 40,000 tons of rock and fill from Camp Berkeley (to become known as Camp Herms in 1939) during the years 1938 to 1942 for use in the construction of the road around Berkeley's Aquatic Park, which was also being constructed during that period of time.

17. The rock and fill which the Boys Scouts permitted to be removed from Camp Berkeley in 1938-1939 was worth between $0.25 and $0.82 per ton. At that price, the second

40,000 tons of rock and fill would have cost between ten thousand dollars ($10,000.00) and thirty two thousand eight hundred dollars ($32,800.00) during those years. In 1937, berth rental at the Marina for boats over 35 feet was only seven dollars and fifty cents ($7.50) per month.

19. A variety of Berkeley City Council resolutions were enacted relating to the above described (oral/implied contract/estoppel) arrangements between the City of Berkeley, Boy Scouts and the Sea Scouts.

20. In 1945, the City of Berkeley confirmed, via City Council Resolution, (Resolution No. 27.738, N.S.) that the Boy Scouts and Sea Scouts were granted the use of berth and mooring facilities in the Berkeley Yacht Harbor without charge. The Boy Scouts and Sea Scouts were to comply with all rules and regulations applicable to the Berkeley Yacht Harbor and the free use of the facilities was made revocable on 30 days written notice.

21. From 1937 to 1969, the Berkeley Sea Scouts and their adult volunteers enjoyed berth and mooring facilities in the Berkeley Yacht Harbor without charge or incident.

22. In 1969, the City of Berkeley Waterfront Manager recommended discontinuing free berthing for the Sea Scouts boats/ships for financial reasons. In 1969, the City of Berkeley, via City Council Resolution, (Resolution No. 42,885, N.S.) then agreed in writing to provide the Boy Scouts, for use by the Berkeley Sea Scouts, the use of six boat berths, two dry storage spaces and one dock locker without charge at the Berkeley Marina. The Boy Scouts and Sea Scouts were to comply with all rules and regulations applicable to the Berkeley Marina and the free use of the facilities was made revocable on 30 days written notice to be given by the City Manager of the City of

Berkeley. The Boys Scouts agreed to be bound by the terms of that Resolution (written/implied contract/lease).

23. That Resolution agreement (written contract/implied contract/lease) with the City of Berkeley was made for the express benefit of the Berkeley Sea Scouts and adult volunteers then participating in the Berkeley Sea Scouts program, as well as for the benefit of all future Berkeley Sea Scouts and all adult volunteers who would participate in the Berkeley Sea Scouts program in the future.

24. From 1969 to May 21, 1998, the Berkeley Sea Scouts and their adult volunteers enjoyed free berths, dry storage spaces and a dock locker in the Berkeley Marina without charge.

25. Because Defendants vehemently disagreed with the national Boy Scouts of America organization viewpoints and policies of excluding avowed homosexuals (sexual orientation) and atheists (religious belief) from the Boy Scouts of America organization, Defendants decided to punish and intentionally discriminated against the completely innocent children and community volunteer Plaintiffs BERKELEY SEA SCOUTS by deliberately targeting them in efforts to run them out of town because of their affiliation/association with the Boy Scouts of America organization. On March 4, 1997, Defendants used the vehicle of a City Council resolution (Resolution No. 58,859, N.S.) to attempt to run the Plaintiffs BERKELEY SEA SCOUTS out of the Berkeley Marina.

That Resolution provided, inter alia, that the availability and use of the facilities of the Berkeley Marina would not be predicated on a person's religious or sexual orientation. That Resolution applied to the free use of berth space in the Berkeley Marina and to no other area of the City. That Resolution (Resolution No. 58,859, N.S.) applied to only the Berkeley Sea

Scouts and to no other group. At the time, the Berkeley Sea Scouts was the only group receiving free berth space in the Marina.

Defendants efforts to run the BERKELEY SEA SCOUTS out of the Berkeley Marina because of their association with the Boy Scouts were somewhat successful. The BERKELEY SEA SCOUT ship Northland was forced to leave the Berkeley Marina, because they could not afford to pay the demanded berth fees—a fact well known to the Defendants at the time. This violated the Berkeley Sea Scouts rights to freedom of association and equal protection of the laws.

26. The California Supreme Court has decreed that the Boy Scouts of America's policy of discriminating against homosexuals and atheists participation in the Boys Scouts organization is lawful under the public accommodation laws of California. See **Curran v. Mount Diablo Council of the Boy Scouts** (1998) 17 Cal.4th 670. The United States Supreme Court has also decreed that the Boy Scouts of America's policy of discriminating against homosexuals and atheists participation in the Boys Scouts organization is lawful under public accommodation laws. See **Boy Scouts of America v. Dale** (2000) __ U.S. __, 120 S. Ct. 2446. Any contrary or conflicting actions enactments, resolutions, or other actions on the part of the City of Berkeley in this respect are preempted by State and Federal law.

These policies of the Boy Scouts have rendered the organization very unpopular recently.

27. From 1937 when the Sea Scouts began using the City of Berkeley's Yacht Harbor/Marina without charge through (2/18/99) some 60+ years later, the Berkeley Sea Scouts have not ever discriminated against one, single, solitary person on the

basis of that person's sexual orientation, religion (or atheism), race, creed, color, sex, ethnicity, or national origin.

Defendants have simply erroneously presumed, without holding any due process hearing on the matter, that the Berkeley Sea Scouts were guilty of unlawful discrimination. However, that presumption is and was false, and it has resulted in depriving the Plaintiffs Berkeley Sea Scouts of due process of law. No homosexual, atheist or any other person has ever been harmed or discriminated against by the Berkeley Sea Scouts. There has simply never been any discriminatory conduct on the part of the Berkeley Sea Scouts ever.

The Due Process Clause does not permit a state, in attempting to bar state benefits to a person on the basis of organizational membership to arbitrarily classify innocent persons with others in the organization who have committed unlawful acts. Such a classification is patently arbitrary and discriminatory. **Wieman v. Updegraff** (1952) 344 U.S. 183. 190-193.

28. No fact-finding hearing has ever been held by the City of Berkeley its agents or agencies on whether or not the Plaintiffs Berkeley Sea Scouts have ever actually discriminated against anyone. Yet, their right to free use of the facilities at the Berkeley Marina has been terminated because of their association with the Boy Scouts and Defendants claimed fear that Plaintiffs might unlawfully discriminate against homosexuals and atheists in the future. This violates Plaintiffs freedom of association rights.

The United States Supreme Court has consistently disapproved governmental action denying rights and privileges solely because of a citizen's association with an unpopular organization. Guilt by association alone, without establishing that an individual's association poses the threat feared by the

government, is an impermissible basis on which to deny First Amendment rights. The government has the burden of proving a knowing affiliation with an organization possessing unlawful aims and goals and a specific intent to further those illegal aims. **Healy v. James** (1972) 408 U.S. 169, 185-186 [Denial of free use of public facilities based on plaintiffs' association with unpopular organization held unconstitutional violation of freedom of association]. The Boy Scouts goals here, however, have been decreed lawful by the highest courts of our land.

Moreover, where there was no evidence that the particular Plaintiffs acting together would cause the feared illegal activities, such fears do not support the infringement of the right to freedom of expression. **Healy v. James** (1972) 408 U.S. 169, 190-191. Here, there is no evidence that Plaintiffs or any participant in the Berkeley Sea Scouts program was going to unlawfully discriminate against anyone, yet they have been penalized by the deprivation of the continued free use of the public facilities.

This also violated the Berkeley Sea Scouts, rights of freedom of speech, to due process of law and equal protection of the laws. The United States Supreme Court has never approved a classification that aids persons perceived as members of relatively victimized groups (i.e., gays and atheists) at the expense of other innocent individuals (i.e., Sea Scouts) in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. **Regents of the University of California v. Bakke** (1978) 438 U.S. 265, 308, 98 S.Ct. 2733, 2757. There have been none by Plaintiffs Berkeley Sea Scouts.

29. The membership of the Berkeley Sea Scouts in 1997 and continuing through 1998 reflects the ethnic diversity of the City of Berkeley and the East Bay Area with membership being approximately 40% Euro-American, 20% African-American,

20% Hispanic, 10% Asian-American, and 10% Filipino-American and Pacific Islander. There is also participation by girls in Sea Scout activities.

Although the Berkeley Sea Scouts program is associated/affiliated with the Boy Scouts of America, it receives no direct funding from the Boy Scouts of America. The BERKELEY SEA SCOUT program does, however, receive maritime liability insurance coverage on the Sea Scouts boats at a greatly reduced rate from the Boy Scouts of America.

30. On February 11, 1998, the City of Berkeley Waterfront Commission held a meeting at which the continuation of the historically free use of the facilities of the Berkeley Marina by the Sea Scouts was considered. The Waterfront Commission for the first time confronted the Plaintiffs Sea Scouts regarding the national Boy Scouts organization policies of discrimination against homosexuals and atheists which the Commission stated conflicted with the City of Berkeley's March 4, 1997, resolution (Resolution No. 58,859, N.S.). The matter was continued to March, 1998.

31. On February 19, 1998, Jamie Wasson, Chairperson of the City of Berkeley Waterfront Commission, stated to the Plaintiffs Sea Scouts that the Commission believed that the Sea Scouts were sincere regarding their openness to admitting atheists and gays into the Berkeley Sea Scouts.

On February 19, 1998, Defendants threatened that the Plaintiffs Berkeley Sea Scouts would be required to subscribe to a specifically worded pledge of fealty to Defendants' policies regarding gays and atheists or lose their continued free use of the Marina berths. Defendants required that this "loyalty oath" be made in writing via a "local policy statement" according to Defendants' specifically worded pledge or else, the Plaintiffs Berkeley Sea Scouts continued free use of the public facilities

at the Marina (which they had enjoyed for over 60 years) would be terminated. This violated the Plaintiffs' constitutional free speech rights by attempting to compel the Plaintiffs to adopt and speak Defendants' specified viewpoint on a controversial issue.

A governmental agency may not constitutionally refuse a public benefit (I.e. tax exemption, free berth) based upon a person's refusal to subscribe to a "loyalty oath" adopting the government's viewpoint. See **Speiser v. Randall** (1958) 357 U.S. 513; **Wieman v. Updegraff** (1952) 344 U.S. 183. This violates Plaintiffs' constitutional free speech rights. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government. **Perry v. Sindermann** (1972) 408 U.S. 593; **Dolan v. City of Tiaard** (1994) 512 U.S. 377, 385.

Furthermore, Defendants attempted to force the Plaintiffs Sea Scouts to state the Defendants' "loyalty oath" which directly conflicted with the national Boy Scouts of America policies to the national leadership of the Boy Scouts of America organization, and the local Mount Diablo Council of the Boy Scouts. This further violated the plaintiffs' free speech rights and free of association rights.

33. The procedure by which the City of Berkeley Waterfront Commission and the Berkeley City Council implemented the March 4, 1997, resolution (Resolution No. 58,859, N.S.) which permitted officials wide or unbounded discretion in granting or denying the Sea Scouts application for continued free use of the facilities of the Berkeley Marina was constitutionally infirm because it permitted officials to base their determination on the content of the ideas sought to be expressed.

34. On February 26, 1998, Jamie Wasson, Chairperson of the City of Berkeley Waterfront Commission, again threatened the Sea Scouts that City of Berkeley public officials required that the Plaintiffs Berkeley Sea Scouts subscribe to a specifically worded pledge of fealty to Defendants' policies regarding gays and atheists ("loyalty oath") and that such statement would have to be adopted and made known to each of the boys in the Berkeley Sea Scouts or else, the Plaintiffs Berkeley Sea Scouts continued free use of the Marina would be terminated. This violated the Plaintiffs' constitutional free speech rights by attempting to compel the Plaintiffs to adopt and speak Defendants' specified viewpoint on a controversial issue.

Furthermore, Defendants insisted that the "loyalty oath" statement by Plaintiffs regarding gays and atheists would also have to be made directly to the Boy Scouts national organization as well: imperiling, inter alia, Plaintiffs relationship with the Boy Scouts, as well as the liability insurance benefits and rights to continued use of the Northland boat obtained through the Boy Scouts. This violated Plaintiffs' rights of freedom of association.

36. On February 26, 1998, Defendants' public officials again, attempted to write the content of the demanded "loyalty oath" by the Plaintiffs Berkeley Sea Scouts; for example, they continued to demand that "The boys must know that they are not obligated to swear to the [Scout] oath, and that they are welcome regardless of their [sexual] orientation, religion, physical condition, marital status, etc." This violated Plaintiffs' rights of freedom of speech and association.

37. At all times mentioned herein, the policies of the national Boy Scouts of America ("BSA") organization are and have been beyond the control of the Plaintiffs Berkeley Sea Scouts. The Boy Scouts of America total approximately

5,000,000 persons. The Plaintiffs Berkeley Sea Scouts participants at issue here are comprised of only about 150 persons who are not involved in the administration of the national BSA organization. Unit level operations such as the Berkeley Sea Scouts simply cannot set or modify national Boy Scouts of America organization policies.

Indeed, at all times mentioned herein, the Defendants knew these facts, and yet chose to punish, penalize and deprive innocent children and adult volunteers (Plaintiffs Berkeley Sea Scouts) of their rights secured by the laws and the Constitutions of the United States and of the State of California, by depriving them of the continued free use of the facilities at the Berkeley Marina for associating with the Boy Scouts of America and for failing to adopt the City of Berkeley's approved message and to disapprove a disfavored one (national Boy Scouts of America policies regarding homosexuals and atheists) on issues beyond Plaintiffs control in order for Defendants to make a political statement of their own to the national Boy Scouts of America organization.

This violated Plaintiffs' rights of freedom of speech and association. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government. **Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.**, (1995) 515 U.S. 557, 579, 115 S. Ct. 2338, 2350.

40. On March 11, 1998, at a meeting of the Waterfront Commission, Ms. Jamie Wasson, Chair of the Waterfront Commission, again threatened that Defendants would terminate the Plaintiffs Sea Scouts historically free use of the facilities at the Berkeley Marina because of their association with the Boy Scouts of America. The Waterfront Commission continued the

matter until April, 1998, with the Commission directing the Sea Scouts to attempt to get a waiver of the national Boy Scouts of America policies regarding homosexuals and atheists from the Boy Scouts of America. This violated Plaintiffs' rights of freedom of speech and association.

41. It was made clear at that March 11, 1998, meeting and shortly thereafter by City of Berkeley public officials, that if the Plaintiffs Sea Scouts did not officially state the "loyalty oath" demanded by Defendants that directly challenged the Boy Scouts national policies, the Plaintiffs Berkeley Sea Scouts historically free use of Marina would be terminated and the Sea Scouts would face eviction from the Marina. This violated Plaintiffs' rights of freedom of speech and association.

42. It was also made clear at that March 11, 1998, meeting and shortly thereafter by Defendant City of Berkeley public officials, particularly Diane Woollen, Council member Kriss Worthington and Jamie Wasson, that the City of Berkeley intended to attempt to overturn the national policies of the national Boy Scouts of America organization relating to the admission of homosexuals and atheists by threatening and taking punitive actions against the Plaintiffs Berkeley Sea Scouts. Defendants attempted to use, threaten and penalize the innocent Plaintiffs as political pawns to pressure the national Boy Scouts of America organization to change its national policies on gays and atheists. This violated Plaintiffs' rights of freedom of speech and association.

43. Thereafter, the Berkeley Sea Scouts attempted to comply with the City of Berkeley's requirements by negotiating a resolution of the matter with the regional office of the Boys Scouts of America: the Mount Diablo Council of the Boy Scouts of America. The Berkeley Sea Scouts and the Mount Diablo Council reached agreement on and approved a local statement of policy designed to satisfy the City of Berkeley and

its public officials on the gay and atheist issues. It was embodied in a letter dated April 8, 1998, directed to Cliff Marchetti, Waterfront Manager, City of Berkeley. In that letter, Plaintiffs agreed to comply with Defendant's resolutions and ordinances prohibiting discrimination based upon sexual orientation or religious beliefs.

44. On April 8, 1998, the Berkeley Sea Scouts' letter of that same date was presented to the City of Berkeley Waterfront Commission. Upon motion, some of Defendants public officials voted to recommend that the Berkeley City Council no longer provide free berths to the Sea Scout vessels as long as the Sea Scouts are affiliated/associated with the Boys Scouts of America. The motion failed for a lack of majority. This action threatened Plaintiffs' rights of freedom of speech and association and equal protection of the laws.

45. Thereafter, at the April 8, 1998, meeting the Waterfront Commission found that the Plaintiffs Berkeley Sea Scouts provided a public service that was more valuable than the value of the berths rental fees. The Commission recommended that the Berkeley City Council approve the free berths at the Marina for one year for all Berkeley Sea Scout vessels, on condition that the Sea Scout letter dated April 8, 1998, be distributed to all Boy Scout members and persons associated with the Berkeley Sea Scout program and on the further condition that the Sea Scouts initiate a dialogue with the Mount Diablo Council of Boy Scouts on changing the national Boy Scouts of America organization's policies regarding gays and atheists. This interfered with and violated Plaintiffs' rights of freedom of speech and association and equal protection of the laws. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government. **Perry v. Sindermann** (1972)

408 U.S. 593; **Dolan v. City of Tigard** (1994) 512 U.S. 377, 385.

46. At that very same meeting of the City of Berkeley Waterfront Commission on April 8, 1998, the application by the Nautilus Institute for a free berth at the Berkeley Marina for the Pegasus vessel was approved without the imposition of any conditions. The Cal Sailing Club and the Berkeley Yacht Club also continue to receive free berths/dock space and use of the Berkeley Marina and they have not been subjected to the same requirements by the City of Berkeley that have been imposed upon the Berkeley Sea Scouts. This violated Plaintiffs' rights of equal protection and against unlawful discrimination under the laws.

47. On May 5, 1998, the Berkeley City Council considered the application of the Berkeley Sea Scouts for the continuation of their historic free use of the facilities of the Berkeley Marina. At that time, Defendants were made aware that the Plaintiffs Berkeley Sea Scouts had never unlawfully discriminated against one, single, solitary person in the more than 60 years the Sea Scouts had enjoyed the free use of the facilities in the Marina. Defendants were also made aware that Plaintiffs, via the April 8, 1998 letter had agreed not to discriminate against gays or atheists. Defendants were also aware that the California Supreme Court declared on March 23, 1998, in **Curran v. Mount Diablo Council of the Boy Scouts** (1998) 17 Cal.4th 670, that the Boy Scouts organization's policies of excluding gays and atheists was not unlawful discrimination under California law.

48. At the May 5, 1998, meeting, the Berkeley City Council was repeatedly made aware that the Council's proposed termination of the Plaintiffs Berkeley Sea Scouts' continued free use of boat berths and other facilities at the Berkeley Marina would not impact the national Boy Scouts of America

organization's policies regarding gays and atheists, but instead would only serve to injure and penalize those innocent boys, girls and adult volunteers who participate in the Berkeley Sea Scouts program and who had done absolutely nothing wrong. The City Council was further made aware that the Council's proposed action, which was being taken in efforts by the City of Berkeley to politically challenge the national policies of the Boy Scouts of America, would only serve to destroy a beneficial local program for teenagers that teaches them useful skills, teamwork and responsibility.

49. At the May 5, 1998, meeting, the Berkeley City Council was also made aware that in the 60+ years that the Berkeley Sea Scouts had operated their program out of the Berkeley Marina/Harbor the Berkeley Sea Scouts have NEVER once discriminated against any gay, atheist or anyone else. The Council was further made aware that there had NEVER been a single violation of any City of Berkeley ordinance or resolution by the Berkeley Sea Scouts; the Berkeley Sea Scouts were in complete compliance with all of the ordinances and laws of the City of Berkeley. The Council was further made aware that the Berkeley Sea Scouts is a very diverse group composed of many Hispanics, Asians, African-Americans, Caucasians as well as others; Girls also participated in the Berkeley Sea Scouts program.

50. At the May 5, 1998, meeting, the Berkeley City Council was also made aware that at least one atheist was at that time currently participating in the Berkeley Sea Scouts program-proving that the Berkeley Sea Scouts did not and do not discriminate.

51. At the May 5, 1998, meeting, the Berkeley City Council was made aware that the Berkeley Sea Scouts program offered a positive outlet for economically disadvantaged inner-

city youths and job-training while vocational programs in public schools were being cut back.

52. At the May 5, 1998, meeting, the Berkeley City Council was also made aware that a person can be a Berkeley Sea Scout and not personally agree with or ascribe to the gay/atheist policies of the national Boy Scouts organization; Plaintiffs pleaded not to be penalized for merely associating or affiliating with the national Boy Scouts of America organization.

53. At the May 5, 1998, meeting, the Berkeley City Council was made aware that many of the youths who participated in the Berkeley Sea Scouts do not have the financial means to participate in such activities outside of the Berkeley Sea Scouts program.

54. At the May 5, 1998, meeting, the Mayor of the City of Berkeley and Councilperson Shirley Dean admitted that the City of Berkeley knew that the Berkeley Sea Scouts could not afford to pay the Berkeley Marina berth fees required for the Berkeley Sea Scout boats if the historic free use of the berths were to be terminated by the City of Berkeley. In other words, they knew that a termination of the continued free usage of the Marina would result in the constructive eviction of the Plaintiffs Sea Scouts. This was the Defendants' plan all along.

55. At the, May 5, 1998, meeting, the Berkeley City Council was made aware that the Berkeley Sea Scout program helped troubled youths learn respect for themselves, superiors and helped to keep them out of trouble. The Council was further made aware that most of the kids in the Berkeley Sea Scout program came from low-income homes.

56. At the May 5, 1998, meeting, the Berkeley City Council made a statement applauding and commending the

Berkeley Sea Scouts' for their efforts to modify the national Boy Scouts of America organization policies regarding gays and atheists. Furthermore, the Council expressly acknowledged the enormous contributions to the community by Berkeley Sea Scout ship Skippers Peter Saugman, William Brazil and Gene Evans and many others.

57. At the May 5, 1998, meeting, Defendants' public officials made it quite clear that the City of Berkeley should deprive the local Plaintiffs Berkeley Sea Scouts of the historic free use of the Berkeley Marina in order to compel them to promote the City of Berkeley's approved message (of nondiscrimination against gays and atheists) and to discourage a disfavored message (the national policies of the Boy Scouts of America). Yet, such conduct is unlawful no matter how enlightened either purpose may strike the government. See **Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.** (1995) 515 U.S. 557, 579, 115 S.Ct. 2338, 2350. This violated Plaintiffs' rights of freedom of speech and association and equal protection of the laws.

59. At the May 5, 1998, meeting, Defendants public officials made it clear that the City of Berkeley was seeking to take action against the local Berkeley Sea Scouts to deny them the continued free use of berths at the Berkeley Marina in order to retaliate against the national Boy Scouts of America organization for having declined Timothy Curran's application to become a Scoutmaster some seventeen (17) years earlier in 1981-because Mr. Curran was a gay activist: not because the local Berkeley Sea Scouts had ever done anything wrong.

60. At the May 5, 1998, meeting, Berkeley City Councilperson Betty Olds, speaking from personal experience, acknowledged that as long as there has been Scouting in Berkeley, there have been gays and atheists in all of the Scout

troops in Berkeley, and no one has ever been kicked out for being an atheist or gay.

61. At the May 5, 1998, meeting, Berkeley City officials acknowledged that the Berkeley Sea Scout program is a wonderful program, that the people who run the program were not discriminatory, and that the Sea Scout program is a hugely successful and beneficial program to the community.

62. At the May 5, 1998, meeting, Defendants voted to deny the Plaintiffs Berkeley Sea Scouts the continued free use of the facilities of the Berkeley Marina. This violated Plaintiffs' rights to freedom of speech and association and equal protection under the laws.

63. On or about May 21, 1998, City of Berkeley Waterfront Manager, Cliff Marchetti wrote a letter to the Berkeley Sea Scouts and the Mount Diablo Council of the Boy Scouts of America. That letter repudiated and breached the agreements in effect for over 60 years (oral/written/implied contract/estoppel/lease) referred to above between the City of Berkeley, the Boy Scouts and the Plaintiffs Berkeley Sea Scouts, which granted the Sea Scouts the continued free use of the facilities of the Berkeley Marina, breached the implied covenants of good faith and fair dealing made part of such agreements (oral/written/implied contract/estoppel/lease), and breached the implied covenant of quiet enjoyment made part of the agreements (oral/written/implied contract/estoppel/lease). The reason stated for taking such action was that the Plaintiffs Berkeley Sea Scouts were associated with the national Boy Scouts of America organization which has a national policy of discriminating based on sexual orientation and atheism. The letter stated that the Berkeley City Council had denied the continued free use of the facilities of the Berkeley Marina on that basis alone. This violated Plaintiffs' rights to freedom of speech and association and equal protection under the laws.

64. The May 21, 1998, letter of Waterfront Manager, Cliff Marchetti, further threatened that if the Berkeley Sea Scout boats/ships were not removed within 30 days of the date of that letter, they would be assessed a higher rate of rent than an ordinary monthly berth renter and that other action (eviction) may be taken against them.

65. The May 21, 1998, letter of Waterfront Manager, Cliff Marchetti, did not comply with the requirements of the 1969 City Council Resolution No. 42,885 (written/implied contract/lease) which required that any revocation of that Resolution must be made by written notice given by the City Manager-not the Waterfront Manager. Consequently, no legally effective revocation of the Sea Scout's "permit" granted by City Council Resolution No. 42,885 has occurred to date. A boat berth in a marina is "real property" for the purpose of unlawful detainer statutes and strict compliance with unlawful detainer statutes is required.

66. The actions of the City of Berkeley its agencies and agents, while penalizing innocent children and innocent adult volunteers, has done absolutely nothing for gays or atheists. Defendants actions have done precisely nothing to eliminate discrimination, because there has not been any. Defendants' actions have had absolutely no effect on the national policies of the Boy Scouts, of America. Defendants' actions were not narrowly tailored to achieve a compelling governmental interest.

67. Additionally, "good cause" was required to revoke the "permit" (written/implied contract/lease) between the City of Berkeley, the Boy Scouts and Berkeley Sea Scouts, in order to cause a forfeiture of the rights of the Boy Scouts and Berkeley Sea Scouts. Based on the foregoing facts, no such "good cause" for revocation and forfeiture of the rights of the Boy Scouts and Berkeley Sea Scouts in the free use of the

facilities of the Berkeley Marina which they had enjoyed for a period of over sixty (60) years either exists or has been shown. The law abhors a forfeiture.

69. The City of Berkeley, its agents, officials and representatives' attempt to revoke/deprive the rights of the Boy Scouts and Plaintiffs Berkeley Sea Scouts in the free use of the facilities of the Berkeley Marina without good cause was unlawful and was made in bad faith. It attempted to deprive the Boy Scouts and Berkeley Sea Scouts of the benefits of their earlier agreements (oral/written/implied contract/estoppel/lease) and their rights under the First Amendment of freedom of speech and association.

The United States Supreme Court has appositely decreed that

> For at least a quarter-century, this Court has made clear that, even though a person has no "right" to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest, especially his interest in freedom of speech. **For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited**. This would allow the government to produce a result which it could not command directly. [Citation] Such interference with constitutional rights is impermissible.

Perry v. Sindermann (1972) 408 U.S. 593, 597.

70. At all times mentioned herein, the City of Berkeley, the Waterfront Commission, the City Council, and the agents, officials and representatives of the City of Berkeley knew that the Berkeley Sea Scouts would not be able to continue to pay the sums of money demanded of them to be paid by the City of Berkeley for the rental of the berth spaces they occupied at the Berkeley Marina. They also knew that the membership of the Berkeley Sea Scouts was made up of many economically disadvantaged youths who paid only seven dollars ($7) in annual membership to participate in the Berkeley Sea Scouts program together with unpaid adult volunteers, and that some of the youth participants could not even afford the $7 per year fees.

The City of Berkeley, the Waterfront Commission, and the agents, officials and representatives of the City of Berkeley also knew that the Berkeley Sea Scouts receive no funding from the regional Mount Diablo Council of the Boy Scouts of America nor the national Boy Scouts of America organization. Consequently, the City of Berkeley, the Waterfront Commission, and the agents, officials and representatives of the City of Berkeley knew that by denying the historically free use of the facilities to the Berkeley Sea Scouts and charging them rent for the use of such facilities, this would result in the constructive eviction of the Berkeley Sea Scouts from the Berkeley Marina because they knew the Berkeley Sea Scouts could not afford to continue to pay such rents.

In fact, the Berkeley Sea Scouts ship Northland and other Sea Scout boats were forced to re-locate to berths and facilities in another city because of this fact. Moreover, the Berkeley Sea Scouts ship Farallon has gone from being a free berth user to paying more money each month in berth rentals than most, if not all, of the other berth renters at the Berkeley Marina—which the Berkeley Sea Scouts cannot afford to continue to pay.

71. The foregoing described conduct on the part of the City of Berkeley, the Berkeley City Council, the City of Berkeley Waterfront Commission, Mr. Cliff Marchetti, Ms. Jamie Wasson, Ms. Diane Woollen, and some other presently unidentified City of Berkeley public officials, agents or representatives unlawfully deprived/denied/infringed the Berkeley Sea Scouts (youth participants and adult volunteers) Federal Constitutional and State Constitutional rights to due process of law [14th Amendment; Cal. Const. Art. I, section 7], freedom of speech [First Amendment; Cal. Const. Art. I, section 2], freedom of association [First Amendment; Cal. Const., California law], impairment of the obligation, of contracts [U.S. Constitution, Art. I, section 10, clause 1], and equal protection of the laws [14th Amendment, Cal. Const. Art. I, section 7], violated 42 U.S.C. section 1983 [deprivation of rights under color of state law], violated Civil Code section 51 (Discrimination in equal accommodations of facilities—affiliation with Boy Scouts of America), Civil Code section 52, (Denial of civil rights or discrimination-penalties, damages), Civil Code section 52.1 (Threats, intimidation, coercion or other interference with any rights provided by the Federal or State Constitutions or laws), Civil Code section 1714(a) (Negligence and duty of care), Government Code section 814, et seq. (breach of contract) Government Code section 815.2 (government entity respondeat superior liability for all tortious acts and omissions of employees within the scope of employment), Government Code section 815.6 (failure to execute mandatory duty), Government Code section 12948 (Denial of civil rights as unlawful), and violated the City of Berkeley's own March 4, 1997 resolution (Resolution No. 58,859, N.S. availability and use of the Berkeley Marina facilities not to be predicated on a person's political affiliation [association with Boy Scouts of America]) and breached the agreements (oral/written/implied contract/estoppel/lease) between the City of Berkeley, the Boy Scouts and Berkeley Sea Scouts, providing for the continued free use of the facilities of

the Berkeley Marina by the Sea Scouts, breached the implied covenants of good faith and fair dealing made part of such agreements (oral/written/implied contract/estoppel/lease), breached the implied covenant of quiet enjoyment made part of the agreements (oral/written/implied contract/estoppel/lease), and constituted a constructive eviction of the Berkeley Sea Scouts, violated California Constitution, Article I, section 19 (private property rights may not be taken, invaded or damaged without just compensation being made to the property owner/possessor/user), and violated and/or deprived the Berkeley Sea Scouts of other rights, privileges or immunities of the Berkeley Sea Scouts secured by the Constitutions or laws of the United States or the State of California.

FIRST CAUSE OF ACTION

[Breach of Contract in Writing,
Implied Covenant of Quiet Enjoyment]

As for the FIRST CAUSE OF ACTION, Plaintiffs allege against defendants CITY OF BERKELEY, CITY OF BERKELEY-CITY COUNCIL, CITY OF BERKELEY-WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, and each of them as follows:

72. Plaintiffs reallege all of the paragraphs of the PRELIMINARY STATEMENT of this Complaint as though fully set forth at this point.

73. In 1969, the City of Berkeley, via City Council Resolution, (Resolution No. 42,885, N.S.) agreed in writing to provide the Boy Scouts, for use by the Berkeley Sea Scouts, the use of six boat berths, two dry storage spaces and one dock locker without charge at the Berkeley Marina. The Boy Scouts and Sea Scouts were to comply with all rules and regulations applicable to the Berkeley Marina and the free use of the facilities was made revocable on 30 days written notice by the

City Manager. The Boy Scouts agreed to be bound by the terms of that Resolution (written/implied contract/lease).

74. That Resolution agreement (written contract/implied contract/lease) with the City of Berkeley was made for the express benefit of the Berkeley Sea Scouts and adult volunteers then participating in the Berkeley Sea Scouts program, as well as for the benefit of all future Berkeley Sea Scouts and all adult volunteers who would participate in the Berkeley Sea Scouts program in the future.

75. Plaintiffs and the Boy Scouts of America have fully performed all conditions, covenants, and promises required of them under the agreements (oral/written/implied contract/estoppel/lease).

75.1 The 1969 resolution (Resolution No. 42,885. N.S.) is a contract that does not conflict with the Defendant City of Berkeley's "Charter" section proffered by defendants that the contract be (1) in writing, (2) executed in the name of the city by an officer or officers authorized to sign same and (3) be countersigned by the Auditor who shall number and register it in a book have all been substantially met here. See **Milovich v. City of Los Angeles** (1941) 42 Cal. App. 2d 364, 371-372.

The 1969 resolution is (1) in writing, (2) signed by an Assistant City Attorney, signed in the name of the City by the Mayor and President of the Berkeley City Council, and it is also signed by the City Clerk and Clerk of the City Council on behalf of the entire City Council. (3) There is no evidence that in 1945 or in 1969 the Auditor was required to countersign the contract. In any event, the Auditors' ministerial duties of signing and numbering it (it is numbered as Resolution No. 42,885) and placing it in a book have been fulfilled by the City Clerk in this instance (City Council Minutes).

Additionally, Plaintiffs are informed and believe that the 1969 resolution is enforceable in any event under the provisions of the Defendant City of Berkeley's Charter sections 67.2, Charter Article IX regarding the powers of the City and City Council (in effect in 1969 but repealed in 1974). Charter sections 110, 111, and 116 (in effect in 1969 but repealed in 1974), Charter section 118.

76. On or about May 21, 1998, City of Berkeley Waterfront Manager, Cliff Marchetti wrote a letter to the Berkeley Sea Scouts and the Mount Diablo Council of the Boy Scouts of America. That letter repudiated and breached the agreements (written/implied contract/lease) referred to above between the City of Berkeley, the Boy Scouts and Berkeley Sea Scouts, stating that the City of Berkeley would no longer honor the terms of the agreements (written/implied contract/lease) which historically granted the Sea Scouts the free use of the facilities of the Berkeley Marina. That letter breached the implied covenant of good faith and fair dealing made part of such agreements (written/implied contract/lease) and breached the implied covenant of quiet enjoyment made part of the agreements (written/implied contract/lease). The reason stated for the breaches was that the Berkeley Sea Scouts are associated with the national Boy Scouts of America organization which has a national policy of discriminating based on sexual orientation and atheism. The letter stated that the Berkeley City Council had denied the continued free use of the facilities of the Berkeley Marina on that basis alone.

77. "Good cause" was required to revoke the agreements (oral/written/implied contract/lease) between the City of Berkeley, the Boy Scouts and Berkeley Sea Scouts, in order to cause a forfeiture of the rights of the Boy Scouts and Berkeley Sea Scouts. Based on the foregoing facts and the law, no such "good cause" for revocation and forfeiture of the rights of the Boy Scouts and Berkeley Sea Scouts in the free use of the

facilities of the Berkeley Marina which they had enjoyed for a period of over sixty (60) years either exists or has been shown. The law abhors a forfeiture.

78. At the time of the May 21, 1998, letter, the City of Berkeley and Berkeley City Council knew that the Berkeley Sea Scouts could not afford to pay the Berkeley Marina berth fees which would be required for the Sea Scout boats if the historic free use of the berths was terminated. Thus, the repudiation of the agreement (written contract/implied contract/lease) and unilateral termination of the historic free use of the Berkeley Marina facilities constituted a constructive eviction of the Plaintiffs and the Berkeley Sea Scouts.

79. As a result of Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL, CITY OF BERKELEY-WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, breach of the alleged agreements, Plaintiffs have suffered the following damages:

The reasonable rental value, in a sum according to proof at trial, for the loss of use of six (6) berths, two dry storage spaces and one dock locker for free which the Berkeley Sea Scouts have been deprived of commencing in June of 1998, and continuing into the future for the next 100 years with periodic adjustments for inflation, etc., including, without limitation, the following Berkeley Marina berth spaces Slip 0-320, 0-520, 0-601, 0-813, 0-815, and Y002.

Berkeley Marina berth rental fees of $433.00 per month relating to the Berkeley Sea Scout ship Farallon which commenced in June, 1998, and will continue into the future for the next 100 years with periodic rate increases and adjustments for inflation, etc. in a sum according to proof at trial.

General and compensatory damages; including without limitation, telephone expenses, photocopying expenses, and other out-of-pocket losses in a sum according to proof at trial.

WHEREFORE, Plaintiffs pray judgment as hereinafter set forth.

SECOND CAUSE OF ACTION
[Breach of Oral/Implied Contract]

As for the SECOND CAUSE OF ACTION, Plaintiffs allege against defendants CITY OF BERKELEY, CITY OF BERKELEY-CITY COUNCIL, CITY OF BERKELEY-WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, and each of them as follows:

80. Plaintiffs reallege all of the paragraphs of the PRELIMINARY STATEMENT of this Complaint as well as all of the paragraphs of the FIRST CAUSE OF ACTION as though fully set forth at this point.

81. In or around 1936 or 1937 the Mount Diablo Council of the Boy Scouts of America ("Boy Scouts") reached an agreement (oral/implied contract) with the City of Berkeley, whereby the Boy Scouts permitted the City of Berkeley to quarry and remove 40,000 tons of rock and fill from the hills of Camp Berkeley (owned by the Boy Scouts of America) during the year 1937 for use in the construction of the Berkeley Marina and the sea wall breakwater for the Berkeley Marina which was being constructed during that time. In exchange, the City of Berkeley was to provide permanent free mooring and berthing rights for the boats/ships of the Berkeley Sea Scouts in the Berkeley Yacht Harbor/Marina.

82. The agreement (oral/implied contract) with the City of Berkeley was made for the express benefit of the Berkeley Sea Scouts and adult volunteers then participating in the

Berkeley Sea Scouts program, as well as for the benefit of all future Berkeley Sea Scouts and all adult volunteers who would participate in the Berkeley Sea Scouts program in the future.

83. The rock and fill which the Boys Scouts permitted to be removed from Camp Berkeley pursuant to the agreement (oral/implied contract) was worth approximately $0.25-$0.50 per ton in 1937. At that price, the 40,000 tons of rock and fill provided by the Boy Scouts on behalf of the Sea Scouts to the City of Berkeley would have cost between ten and twenty thousand dollars ($10,000-$20,000) in 1937. In 1937, berth rental at the Marina for boats over 35 feet was only five dollars ($5) per month.

84. In furtherance of that agreement (oral/implied contract) with the City of Berkeley, the Boy Scouts continued to permit the City of Berkeley without any charge to remove an additional 40,000 tons of rock and fill from Camp Berkeley (to become known as Camp Herms in 1939) during the years 1938-1942 for use in the construction of the road around Berkeley's Aquatic Park, which was also being constructed during that period of time.

85. The rock and fill which the Boys Scouts permitted to be removed from Camp Berkeley in 1938-1939 was worth between $0.25 and $0.82 per ton. At that price, the second 40,000 tons of rock and fill would have cost between ten thousand dollars ($10,000.00) and thirty two thousand eight hundred dollars ($32,800.00) during those years. In 1937, berth rental at the Marina for boats over 35 feet was only seven dollars and fifty cents ($7.50) per month.

86. A variety of Berkeley City Council resolutions were enacted relating to the above described (oral/implied contract) arrangements between the City of Berkeley, Boy Scouts and the Sea Scouts.

87. In 1945, the City of Berkeley confirmed, via City Council Resolution, (Resolution No. 27,738, N.S.) that the Boy Scouts and Sea Scouts had been granted the use of berth and mooring facilities in the Berkeley Yacht Harbor without charge. The Boy Scouts and Sea Scouts were to comply with all rules and regulations applicable to the Berkeley Yacht Harbor and the free use of the facilities was made revocable on 30 days written notice. A copy of that Resolution is attached as Exhibit C and incorporated by this reference.

88. Plaintiffs and the Boy Scouts of America have fully performed all conditions, covenants, and promises required of them under the agreements (oral/implied contract).

89. From 1937 to May 21, 1998, the Defendants honored the terms of that oral/implied contract through a sixty (60) years course of conduct and the Berkeley Sea Scouts and their adult volunteers enjoyed berth and mooring facilities in the Berkeley Yacht Harbor without charge or incident.

90. Plaintiffs are informed and believe that an oral/implied contract is enforceable against Defendants under the provisions of the Defendant City of Berkeley's Charter sections 67.2, Charter Article IX regarding the powers of the City and City Council (in effect in 1969 but repealed in 1974), Charter sections 110, 111, and 116 (in effect in 1969 but repealed in 1974), Charter section 118.

91. On or about May 21, 1998, City of Berkeley Waterfront Manager, Cliff Marchetti wrote a letter to the Berkeley Sea Scouts and the Mount Diablo Council of the Boy Scouts of America. That letter repudiated and breached the agreements (Oral/implied contract) referred to above between the City of Berkeley, the Boy Scouts and Berkeley Sea Scouts, stating that the City of Berkeley would no longer honor the terms of the agreements (Oral/implied contract) which

historically granted the Sea Scouts the free use of the facilities of the Berkeley Marina. That letter also breached the implied covenant of good faith and fair dealing made part of such agreements (Oral/implied contract). The reason stated for the breaches was that the Berkeley Sea Scouts are associated with the national Boy Scouts of America organization which has a national policy of discriminating based on sexual orientation and atheism. The letter stated that the Berkeley City Council had denied the continued free use of the facilities of the Berkeley Marina on that basis alone.

92. "Good cause" was required to revoke the agreements (oral/implied contract) between the City of Berkeley, the Boy Scouts and Berkeley Sea Scouts, in order to cause a forfeiture of the rights of the Boy Scouts and Berkeley Sea Scouts. Based on the foregoing facts and the law, no such "good cause" for revocation and forfeiture of the rights of the Boy Scouts and Berkeley Sea Scouts in the free use of the facilities of the Berkeley Marina which they had enjoyed for a period of over sixty (60) years either exists or has been shown. The law abhors a forfeiture.

93. At the time of the May 21, 1998, letter, the City of Berkeley and Berkeley City Council knew that the Berkeley Sea Scouts could not afford to pay the Berkeley Marina berth fees which would be required for the Sea Scout boats if the historic free use of the berths was terminated. Thus, the repudiation of the agreements (oral contract/implied contract) and unilateral termination of the historic free use of the Berkeley Marina facilities constituted a constructive eviction of the Plaintiffs and the Berkeley Sea Scouts.

94. As a result of Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL. CITY OF BERKELEY-WATERFRONT COMMISSION, and DOES 1

through 20, inclusive, breach of the alleged agreements, Plaintiffs have suffered the following damages:

The reasonable rental value, in a sum according to proof at trial, for the loss of use of six (6) berths, two dry storage spaces and one dock locker for free which the Berkeley Sea Scouts have been deprived of commencing in June of 1998, and continuing into the future for the next 100 years with periodic adjustments for inflation, etc.. Including, without limitation, the following Berkeley Marina berth spaces Slip 0-320, 0-520, 0-601, 0-813, 0-81 5, and Y002.

Berkeley Marina berth rental fees of $433.00 per month relating to the Berkeley Sea Scout ship Farallon which commenced in June, 1998, and will continue into the future for the next 100 years with periodic rate increases and adjustments for inflation, etc. in a sum according to proof at trial.

General and compensatory damages, including without limitation, telephone expenses, photocopying expenses, and other out-of-pocket losses in a sum according to proof at trial.

WHEREFORE, Plaintiffs pray judgment as hereinafter set forth.

THIRD CAUSE OF ACTION
[Estoppel]

As for the THIRD CAUSE OF ACTION, Plaintiffs allege against defendants CITY OF BERKELEY, CITY OF BERKELEY-CITY COUNCIL, CITY OF BERKELEY-WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, and each of them as follows:

95. Plaintiffs reallege all of the paragraphs of the PRELIMINARY STATEMENT of this Complaint, all of the

paragraphs of the FIRST CAUSE OF ACTION, and all of the paragraphs of the SECOND CAUSE OF ACTION as though fully set forth at this point.

96. Defendants by making oral representations/ assurances that the Boys Scouts and Berkeley Sea Scouts would continue to enjoy boat berths, mooring privileges, and other facilities at the Berkeley Marina free of charge managed to obtain tens of thousands of tons of rock and fill worth tens of thousands of dollars from the Boys Scouts and used such rock/fill to create the breakwater for the Berkeley Marina and the roadway for Berkeley's Aquatic Park free of charge.

Additionally, Defendants by making oral representations/ assurances that the Boys Scouts and Berkeley Sea Scouts would continue to enjoy boat berths, mooring privileges, and other facilities at the Berkeley Marina free of charge managed to obtain valuable community service from Plaintiffs Berkeley Sea Scouts free of charge which provided the following services including, without limitation, community outreach programs directed to economically disadvantaged "inner city" youths who would otherwise have no opportunity to be involved in vocational or maritime training, youth training in pipe-fitting, marine engine repair, electrical repair, wood working, large boat handling, small boat handling, navigation, rescue operations, sailing, carpentry, painting, sewing, metal working, fiber glassing, working together as a part of a team with other shipmates, and generally helping to develop skills for a future in a maritime career which services greatly exceeded the rental value of the berths provided.

Such oral representations/assurances by said defendants created a reasonable reliance and belief in the Boys Scouts and Berkeley Sea Scouts that they would continue to enjoy boat berths, mooring privileges, and other facilities at the Berkeley Marina free of charge in perpetuity. It would now be

unconscionable for said defendants to deny that the Boys Scouts and Berkeley Sea Scouts shall continue to enjoy boat berths, mooring privileges, and other facilities at the Berkeley Marina free of charge in perpetuity.

97. Injustice can only be avoided by enforcing such representations/assurances of defendants CITY OF BERKELEY, CITY OF BERKELEY-CITY COUNCIL, CITY OF BERKELEY-WATERFRONT COMMISSION, and DOES 1 through 20, inclusive ,and by estopping said defendants from denying same.

98. As a result of Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL, CITY OF BERKELEY-WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, failure to perform according to their representations/assurances, Plaintiffs have suffered the following damages:

The reasonable rental value, in a sum according to proof at trial, for the loss of use of six (6) berths, two dry storage spaces and one dock locker for free which the Berkeley Sea Scouts have been deprived of commencing in June of 1998, and continuing into the future for the next 100 years with periodic adjustments for inflation, etc.. Including, without limitation, the following Berkeley Marina berth spaces Slip 0-320, 0-520, 0-601, 0-813, 0-815, and Y002.

Berkeley Marina berth rental fees of $433.00 per month relating to the Berkeley Sea Scout ship Farallon which commenced in June, 1998, and will continue into the future for the next 100 years with periodic rate increases, adjustments for inflation, etc. in a sum according to proof at trial.

General and compensatory damages, including without limitation, telephone expenses, photocopying expenses, and other out-of-pocket losses in a sum according to proof at trial.

WHEREFORE, Plaintiffs pray judgment as hereinafter set forth.

FOURTH CAUSE OF ACTION

[Violations of Unruh Act and Berkeley Municipal Code/Resolution]

As for the FOURTH CAUSE OF ACTION, Plaintiffs allege against defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL, CITY OF BERKELEY WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, and each of them as follows:

99. Plaintiffs reallege all of the paragraphs of the PRELIMINARY STATEMENT of this Complaint, all of the paragraphs of the FIRST CAUSE OF ACTION, all of the paragraphs of the SECOND CAUSE OF ACTION, and all of the paragraphs of the THIRD CAUSE OF ACTION as though fully set forth at this point.

100. At all times mention herein, Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL, and CITY OF BERKELEY WATERFRONT COMMISSION, owned, operated, administered and controlled the Berkeley Marina as a business establishment within the meaning of the Unruh Act. The Berkeley Marina is a business establishment and place of public accommodation located in Berkeley, Alameda County, California, that is engaged in the business of providing boat berths, dry storage facilities for boats, and other business and services.

101. Plaintiffs are all participants in the Berkeley Sea Scout program. The Sea Scouts are a subdivision of the national Boy Scouts of America organization.

102. Because Defendants vehemently disagreed with the national Boy Scouts of America organization viewpoints and policies of excluding gays and atheists from the Boy Scouts of America organization, Defendants decided to arbitrarily and unlawfully punish and intentionally discriminate against the completely innocent children and community volunteer Plaintiffs BERKELEY SEA SCOUTS by deliberately targeting them in efforts to run them out of town because of their affiliation/association with the Boy Scouts of America organization. On March 4, 1997, Defendants used the vehicle of a City Council resolution (Resolution No. 58,859, N.S.) to attempt to run the Plaintiffs BERKELEY SEA SCOUTS out of the Berkeley Marina.

That Resolution provided, inter alia, that the availability and use of the facilities of the Berkeley Marina would not be predicated on a person's religious (atheism) or sexual orientation (gays). That Resolution applied to the free use of berth space in the Berkeley Marina and to no other area of the City. That Resolution (Resolution No. 58,859, N.S.) applied to only the Berkeley Sea Scouts and to no other group. At the time, the Berkeley Sea Scouts was the only group receiving free berth space in the Marina.

Defendants efforts to run the BERKELEY SEA SCOUTS out of the Berkeley Marina because of their association with the Boy Scouts were somewhat successful. The BERKELEY SEA SCOUT ship Northland was forced to leave the Berkeley Marina, because they could not afford to pay the demanded berth fees—a fact well known to the Defendants at the time. This violated the Berkeley Sea Scouts rights to freedom of association and equal protection of the laws and denied

Plaintiffs the full and equal accommodations, advantages, facilities, privileges and services of the Berkeley Marina. No other free berth applicant at the Berkeley Marina was deliberately and specifically singled out and targeted by Defendants in efforts to run them out of town because of their political affiliation with an organization that the Defendants disliked.

Defendants intentionally targeted Plaintiffs for punishment (denial of continued free berths) because of their association with the Boy Scouts despite the fact that Plaintiffs had disavowed the national policies of the Boy Scouts that Defendants' disagreed with, had agreed in writing to obey the Defendants' resolution and ordinances that prohibited discrimination by Plaintiffs based on sexual orientation and religious belief, that an atheist was a member of the Plaintiffs Sea Scouts, that the defendants knew they did not discriminate and were sincere in their openness to admitting gays and atheists, and despite the fact that Defendants knew that gays had always been a part of every scout troop in Berkeley including the Berkeley Sea Scouts, and despite the fact that Plaintiffs Berkeley Sea Scouts had never discriminated against anyone. Defendants conduct penalizing Plaintiffs for their association with the Boy Scouts constituted arbitrary and unlawful discrimination.

The United States Supreme Court has consistently disapproved governmental action denying rights and privileges solely because of a citizen's association with an unpopular organization. Guilt by association alone, without establishing that an individual's association poses the threat feared by the government, is an impermissible basis on which to deny First Amendment rights. **Healy v. James** (1972) 408 U.S. 169, 185-186 [Denial of free use of public facilities based on plaintiffs' association with unpopular organization held unconstitutional violation of freedom of association].

The Due Process Clause does not permit a state, in attempting to bar state benefits to a person on the basis of organizational membership to arbitrarily classify innocent persons with others in the organization who have committed unlawful acts. Such a classification is patently arbitrary and discriminatory. **Wieman v. Updegraff** (1952) 344 U.S. 183, 190-193.

A governmental agency may not constitutionally refuse a public benefit (I.e. tax exemption, free berth) based upon a person's refusal to subscribe to a "loyalty oath" adopting the government's viewpoint. See **Speiser v. Randall** (1958) 357 U.S. 513; **Wieman v. Updegraff** (1952) 344 U.S. 183. This violates Plaintiffs' constitutional free speech rights. Under the well settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government. **Perry v. Sindermann** (1972) 408 U.S. 593; **Dolan v. City of Tigard** (1994) 512 U.S. 377, 385.

Furthermore, Defendants further arbitrarily and unlawfully discriminated against Plaintiffs by attempting to force the Plaintiffs Sea Scouts to state the Defendants' "loyalty oath" which directly conflicted with the national Boy Scouts of America policies to the national leadership of the Boy Scouts of America organization, and the local Mount Diablo Council of the Boy Scouts: imperiling, inter alia, Plaintiffs relationship with the Boy Scouts, as well as the liability insurance benefits and rights to continued use of the Northland boat obtained through the Boy Scouts. This further violated the plaintiffs' free speech rights and free of association rights and was unlawful discrimination to which other free berth applicants were not subjected.

103. This conduct by Defendants violated Civil Code section 51 and section 52 (discriminating, denying, aiding in the

denial and/or inciting the denial of privileges, use of facilities, etc. This also violated Civil Code section 52.1 (Interference by threats, intimidation or coercion with the Plaintiffs' exercise or enjoyment of State and Federal Constitutional rights of free speech, freedom of association, and equal protection of the laws). This also violated City of Berkeley Resolution No. 58,859, N.S. (Availability and use of the Berkeley Marina facilities shall not be predicated on a person's political affiliation).

No other applicant for the free use of the facilities of the Berkeley Marina, aside from the Berkeley Sea Scouts was subjected to such treatment as a condition of receiving free use of the facilities of the Berkeley Marina.

104. On April 8, 1998, the City of Berkeley Waterfront Commission arbitrarily and unlawfully required that the Plaintiffs Berkeley Sea Scouts be permitted to have free berths at the Berkeley Marina for one year on condition that the Sea Scout letter dated April 8, 1998, be distributed to all Boy Scout members and persons associated with the Berkeley Sea Scout program and on the further condition that the Sea Scouts initiate a dialogue with the Mount Diablo Council of Boy Scouts on changing the national Boy Scouts of America organization's policies regarding gays and atheists. No other free berth applicant was required as a condition to receiving a free berth to confront an organization it was associated with and attempt to change its national policies because Defendant did not like its policies. This violated Civil Code section 51 and section 52 (discriminating, denying, aiding in the denial, and/or inciting the denial of privileges, use of facilities, etc. by the Plaintiffs-Berkeley Sea Scouts). This also violated Civil Code section 52.1 (Interference by threats, intimidation or coercion with the Plaintiffs' exercise or enjoyment of State and Federal Constitutional rights of free speech, freedom of association, and equal protection of the laws).

105. At that very same meeting of the City of Berkeley Waterfront Commission on April 8, 1998, the application by the Nautilus Institute for a free berth at the Berkeley Marina for the Pegasus vessel was approved without the imposition of any conditions.

108. On May 5, 1998, the City of Berkeley City Council arbitrarily and unlawfully denied the continuation of the Berkeley Sea Scouts historic free use of the facilities of the Berkeley Marina because the Berkeley Sea Scouts were politically affiliated/associated with the national Boy Scouts of America organization whose national policies were offensive to the City of Berkeley. This violated Civil Code section 51 and section 52 (discriminating, denying, aiding in the denial, and/or inciting the denial of privileges, use of facilities, etc. by the Plaintiffs-Berkeley Sea Scouts). This also violated Civil Code section 52.1 (Interference by threats. intimidation or coercion with the Plaintiffs' exercise or enjoyment of State and Federal Constitutional rights of free speech, freedom of association, and equal protection of the laws).

110. Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL, CITY OF BERKELEY WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, wrongful conduct is continuing in that defendants continue to deny Plaintiffs-Berkeley Sea Scouts the historically free use of the Berkeley Marina by the Berkeley Sea Scouts as well as the full and equal accommodations, advantages, facilities, privileges of the Berkeley Marina as others.

111. As a proximate result of the conduct of Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL, CITY OF BERKELEY WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, as alleged herein, Plaintiffs have suffered the following damages:

The reasonable rental value according to proof at trial for the loss of use of six (6) berths, two dry storage spaces and one dock locker for free which the Berkeley Sea Scouts have been deprived of commencing in June of 1998, and continuing into the future for the next 100 years with periodic adjustments for inflation, etc.. Including, without limitation, the following Berkeley Marina berth spaces Slip 0-320, 0-520, 0-601, 0-813, 0-81 5, and Y -002.

Berkeley Marina berth rental fees of $433.00 per month relating to the Berkeley Sea Scout ship Farallon which commenced in June, 1998, and will continue into the future for the next 100 years with periodic rate increases, adjustments for inflation, etc.

General and compensatory damages, including without limitation, lost wages, telephone expenses, photocopying expenses, and other out-of-pocket losses, cancellation of various Sea Scouting activities due to loss of funds, general impairment of Sea Scouting activities due to loss of funds, loss of members in Berkeley Sea Scouts because certain members could no longer afford to participate in the program due to the financial impact of the City of Berkeley's actions, etc. in a sum according to proof at trial.

Emotional distress and suffering, including without limitation, nervousness, grief, anxiety, worry, sense of powerlessness, feeling of oppression, sense of helplessness, mortification, shock, humiliation, shame, indignity, impairment of reputation, embarrassment, apprehension, fear and ordeal in a sum according to proof at trial.

Reasonable attorney fees incurred to date and as incurred in the future.

Civil statutory damages permitted by law under Civil Code section 52 ($1,000) and Berkeley Municipal, Code section 13.28.080 ($200$400) for each violation and for each Plaintiff.

WHEREFORE, Plaintiffs pray judgment as hereinafter set forth.

FIFTH CAUSE OF ACTION

[Violation of Constitutional Rights-Civil Code § 52.1; Deprivation of Rights Under Color of State Law-42 U.S.C. §§ 1983, 1988]

As for the FIFTH CAUSE OF ACTION, Plaintiffs allege against defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL. CITY OF BERKELEY WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, ("Defendants") and each of them as follows:

112. Plaintiffs reallege all of the paragraphs of the PRELIMINARY STATEMENT of this Complaint, all of the paragraphs of the FIRST CAUSE OF ACTION, all of the paragraphs of the SECOND CAUSE OF ACTION, all of the paragraphs of the THIRD CAUSE OF ACTION and all of the paragraphs of the FOURTH CAUSE OF ACTION as though fully set forth at this point.

113. At all times herein mentioned, Plaintiffs, and each of them, were and are now citizens or persons within the jurisdiction of the United States of America.

113.10. Lack of a contractual right does not defeat a claim that the breach of a "contract" violated Plaintiffs' free speech rights under the First and Fourteenth Amendments. **Perry v. Sindermann** (1972) 408 U.S. 593, 597, 601-602.

114. As alleged above, Defendants' have interfered by threats, intimidation, or coercion, or attempted to interfere by threats, intimidation, coercion, with the exercise or enjoyment by Plaintiffs of their rights secured by the Constitution or laws of the United States or Constitution or laws of the State of California and have deprived Plaintiffs of their rights secured by the Constitution or laws of the United States under color of law as follows:

A. Defendants violated/deprived Plaintiffs of their rights to Due Process by taking from Plaintiffs the right to their free use of the facilities at the Berkeley Marina erroneously presuming, without holding a due process hearing on the matter, that the Berkeley Sea Scouts have been guilty of unlawful discrimination.

B. Defendants violated/deprived Plaintiffs of their rights to Due Process by approving a classification that aids persons perceived as members of relatively victimized groups (i.e., gays and atheists) at the expense of other innocent individuals (i.e., Sea Scouts) in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.

C. Defendants violated/deprived Plaintiffs of their rights to Due Process and freedom of speech by the procedure by which the City of Berkeley Waterfront Commission and the Berkeley City Council implemented the March 4, 1997, resolution (Resolution No. 58,859, N.S.) which permitted officials wide or unbounded discretion in granting or denying the Sea Scouts application for continued free use of the facilities of the Berkeley Marina because it permitted officials to base their determination on the content of the ideas sought to be expressed.

D. Defendants violated/deprived Plaintiffs of their rights to freedom of speech and equal protection of the laws by

attempting to coerce and compel Plaintiffs to state a message favored by Defendants (local policy statement).

E. Defendants violated/deprived Plaintiffs of their rights to freedom of speech and association and equal protection of the laws by attempting to coerce and compel Plaintiffs to adopt a statement which directly conflicted with and challenged the national Boy Scouts of America policies regarding homosexuals and atheists.

F. Defendants violated/deprived Plaintiffs of their rights to freedom of speech, and association and equal protection of the laws by attempting to coerce and compel Plaintiffs to state their disapproval of a message disfavored by Defendants (national Boy Scouts of America policies regarding the admissions of homosexuals and atheists).

G. Defendants violated/deprived Plaintiffs of their rights to freedom of speech and association and equal protection of the laws by attempting to coerce and compel Plaintiffs to attempt to change the policies relating to gays and atheists held by the national Boy Scouts of America organization which are disfavored by Defendants.

H. Defendants violated/deprived Plaintiffs of their rights to freedom of speech and association and equal protection of the laws by attempting to coerce and compel Plaintiffs to sever their affiliation/association with the Boys Scouts of America.

I. Defendants violated/deprived Plaintiffs of their rights to freedom of speech and association and equal protection of the laws by attempting to coerce and compel Plaintiffs to distribute a letter to all Boy Scout members and persons associated with the Berkeley Sea Scout program and to initiate a dialogue with the Mount Diablo Council of Boy Scouts on

changing the national Boy Scouts of America organization's policies regarding gays and atheists.

J. Defendants violated/deprived Plaintiffs of their rights to freedom of speech and association and equal protection of the laws by unilaterally terminating the agreements/arrangements whereby Plaintiffs-Berkeley Sea Scouts had historically used the facilities of the Berkeley Marina free of charge due to Plaintiffs' association/affiliation with the national Boy Scouts of America organization.

K. Defendants violated/deprived Plaintiffs of their rights by terminating the agreements/arrangements whereby Plaintiffs-Berkeley Sea Scouts had historically used the facilities of the Berkeley Marina free of charge via passing resolutions, ordinances and/or laws which impaired the Defendants' obligations under such agreements/arrangements.

L. Defendants violated/deprived Plaintiffs of their rights to freedom of speech and association and equal protection of the laws by attempting to interfere with the internal structure and/or affairs of the Berkeley Sea Scouts and by attempting to write the policies of the Berkeley Sea Scouts program.

M. Defendants violated/deprived Plaintiffs of their rights to freedom of speech and association and equal protection of the laws by discriminating against Plaintiffs-Berkeley Sea Scouts and depriving them of their historic free use of the Berkeley Marina facilities because of their association/affiliation with the Boys Scouts of America while permitting other applicants free berth spaces at the Berkeley Marina (i.e., the Cal Sailing Club, the Berkeley Yacht Club and the Nautilus Institute/Pegasus vessel.) Each of these other groups have continued to enjoy the free use of the facilities of the Berkeley Marina without charge except for the Berkeley Sea

Scouts. This is due to the Berkeley Sea Scouts' association with the Boy Scouts of America.

115. As a proximate result of the conduct of Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL, CITY OF BERKELEY WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, as alleged herein, Plaintiffs have suffered the following damages:

The reasonable rental value according to proof at trial for the loss of use of six (6) berths, two dry storage spaces and one dock locker for free which the Berkeley Sea Scouts have been deprived of commencing in June of 1998, and continuing into the future for the next 100 years with periodic adjustments for inflation, etc., including, without limitation, the following Berkeley Marina berth spaces Slip 0-320, 0-520, 0-601, 0-813,0-815, and Y-002.

Berkeley Marina berth rental fees of $433.00 per month relating to the Berkeley Sea Scout ship Farallon which commenced in June, 1998, and will continue into the future for the next 100 years with periodic rate increases, adjustments for inflation, etc.

General and compensatory damages, including without limitation, lost wages, telephone expenses, photocopying expenses, and other out-of-pocket losses, cancellation of various Sea Scouting activities due to loss of funds, general impairment of Sea Scouting activities due to loss of funds, loss of members in Berkeley Sea Scouts because certain members could no longer afford to participate in the program due to the financial impact of the City of Berkeley's actions, etc. in a sum according to proof at trial.

Emotional distress and suffering, including without limitation, nervousness, grief, anxiety, worry, sense of

powerlessness, feeling of oppression, sense of helplessness, mortification, shock, humiliation, shame, indignity, impairment of reputation, embarrassment, apprehension, fear and ordeal in a sum according to proof at trial.

Reasonable attorney fees incurred to date and as incurred in the future and prejudgment interest thereon until paid.

Civil statutory damages permitted by law under Civil Code section 52 ($1,000) for each violation and for each Plaintiff.

WHEREFORE, Plaintiffs pray judgment against Defendants, and each of them, as follows:

1. For the reasonable rental value, in a sum according to proof at trial, for the loss of use of six (6) berths, two dry storage spaces and one dock locker for free which the Berkeley Sea Scouts have been deprived of commencing in June of 1998, and continuing into the future for the next 100 years with periodic adjustments for inflation, etc.. Including, without limitation, the following Berkeley Marina berth spaces Slip 0-320, 0-520,0-601,0-813,0-81 5, and Y-002.

2. For Berkeley Marina berth rental fees of $433.00 per month relating to the Berkeley Sea Scout ship Farallon which commenced in June, 1998, and will continue into the future for the next 100 years with periodic rate increases, adjustments for inflation.

3. For general and compensatory damages, including without limitation, lost wages, telephone expenses, photocopying expenses, and other out-of-pocket losses, cancellation of various Sea Scouting activities due to loss of funds, general impairment of Sea Scouting activities due to loss of funds, loss of members in Berkeley Sea Scouts because certain members could no longer afford to participate in the

program due to the financial impact of the City of Berkeley's actions.

4. For emotional distress and suffering, including without limitation, nervousness, grief, anxiety, worry, sense of powerlessness, feeling of oppression, sense of helplessness, mortification, shock, humiliation, shame, indignity, impairment of reputation, embarrassment, apprehension. fear and ordeal.

5. For reasonable attorney fees incurred to date and as incurred in the future, including prejudgment interest thereon until paid.

6. For civil statutory damages permitted by law pursuant to Civil Code section 52, and Berkeley Municipal Code section 13.28.080.

7. For costs of suit herein;

8. For such other and further relief as the Court may deem proper.

LAW OFFICES OF JONATHAN D. GORDON

DATED: July 16, 2001

Jonathan D. Gordon
Attorney for Plaintiffs

Appendix E-1

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

June 5, 2006

Mr. John H. Findley
Pacific Legal Foundation
3900 Lennane Drive
Suite 100
Sacramento, CA 95834

Re: Eugene Evans
v. City of Berkeley, California
Application No. 05A1102

Dear Mr. Findley:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on June 5, 2006 extended the time to and including July 7, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ Sandy Spagnolo

Sandy Spagnolo
Case Analyst

Appendix E-2

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. John H. Findley
Pacific Legal Foundation
3900 Lennane Drive
Suite 200
Sacramento, CA 95834

Ms. Manuela Albuquerque
City Attorney
2180 Milvia Street, 4th Floor
Berkeley, CA 94704

Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-3600